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The Global regulation of offshore financial centres with reference to Singapore.

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THE GLOBAL REGULATION OF OFFSHORE FINANCIAL CENTRES WITH REFERENCE TO SINGAPORE

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STATEMENT

This thesis is submitted to Bond University in partial fulfilment of the requirements for the Degree of Doctor of Legal Science.

The thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgment is made.

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Dated 18 November 2004

Angelo M. Venardos

Dedicated to my father, Minas Venardos, who came to Australia in 1937 from the Greek island of Kytheria as a young migrant, fought in the Pacific Islands during World War II, raised a good family, and was a proud community and business leader.

I wish to acknowledge the contribution to my life long education by my mother, Kate.

And to my daughters, Alexandra and Christina, you are always in my heart and mind.

Contents

List of Abbreviations

ABS	Association of Banks (Singapore)
AC	Appeal Cases (England)
A-G	Attorney General
All ER	All England Law Reports (England)
AML	Anti-Money Laundering
AUM	Assets under Management
BIS	Bank for International Settlement
BFSB	Bahamas Financial Services Board
BSA	Bank Secrecy Act (US)
BVI	British Virgin Islands
CAD	Commercial Affairs Department (Singapore)
CARICOM	Caribbean Community (and Common Market)
CDTSCA	Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Singapore)
CEPA	Closer Economic Partnership Arrangements
CFP	Center of Freedom and Prosperity
CFATF	Caribbean Financial Action Task Force
CFC	Controlled Foreign Corporation
CFT	Combating the Financing of Terrorism
DOJ	Department of Justice (US)
DTA	Double Taxation Agreement
DTA	Drug Trafficking (Confiscation of Benefits) Act (Singapore)
DTRoP	Drug Trafficking (Recovery of Proceeds) Ordinance (Hong Kong)
EC	European Commission

ECOFIN	EU Council of Finance Ministers
EU	European Union
FATF	Financial Action Task Force
FAU	Financial Analysis Unit (Panama)
FIAML	Financial Intelligence and Anti-Money Laundering (Mauritius)
FIU	Financial Intelligence Unit
FSAP	Financial Sector Assessment Programme (Mauritius)
FSC	Financial Supervisory Commission (Cook Islands)
FSF	Financial Stability Forum
G8	Group of Eight (Canada, France, Germany, Italy, Japan, Russia, United Kingdom and United States)
GAO	General Accounting Office (US)
GDP	Gross Domestic Product
HCA	Higher Confidentiality Agreement
IBC	International Business Company
IC	International Company
IFC	International Financial Centres
IMF	International Monetary Fund
IOSCO	International Organisation of Securities Commissions
IRAS	Inland Revenue Authority of Singapore
IRS	Inland Revenue Service (US)
ITIO	International Tax and Investment Organisation
JFSC	Financial Services Commission
KYC	Know Your Client
LLC	Limited Liability Company

MACMA	Mutual Assistance in Criminal Matters Act (Singapore)
MAS	Monetary Authority of Singapore
MDL	Misuse of Drugs Law (Cayman Islands)
ML/FT	Money Laundering and Financing of Terrorism
MLRO	Money Laundering Reporting Officer
MoU	Memorandum of Understanding (Jersey)
MROS	Money Laundering Reporting Office Switzerland
NCCT	Non-Cooperative Country and Territory
OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Asset Control (US)
OFC	Offshore Financial Centres
OIA	Offshore Industry (Criminal Provisions) Act (Cook Islands)
OSCO	Organised and Serious Crimes Ordinance (Hong Kong)
PCCL	Proceeds of Criminal Conduct Law (Cayman Islands)
PRC	Peoples Republic of China
PW	Price Waterhouse
RFC	Regional Financial Centres
RMB	Renminbi, official currency for China
SAR	Suspicious Activity Reports
SCA	Serious Crimes Act (Singapore)
SDE	Small and Developing Economy
SIMEX	Singapore International Monetary Exchange
STR	Suspicious Transaction Report
STRO	Suspicious Transaction Reporting Office
TIEA	Tax Information Exchange Agreement

UBS	United Bank of Switzerland
UK	United Kingdom
UN	United Nation
US	United States
USA	United States of America
VFSC	Vanuatu Financial Services Commission
WTO	World Trade Organisation

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Abstract

This thesis sets out to analyse the regulatory bodies' initiatives on offshore financial centres (OFCs) in the context of the hypothesis that Singapore is emerging as the new jurisdiction of choice for global wealth management. The focus is on four major areas; harmful tax practices, money laundering, confidentiality and exchange of information. At a glance, these negative factors are the characteristics of solely an OFC. With initiatives made against their exact method of business and trade, how would the OFCs cope with the regulatory bodies' pressure, and yet not lose their means of survival? They may be facing wealthy and developed nations such as UK and USA, but as a group they have negotiating strength. The OFCs have banded together and made their situations known in several forums with the supranational organisations. The result has been a compromise of the "rules and regulations" laid out in the initiatives, without preventing the major OFCs from functioning as providers of financial services.

Chapter 1 sets out the definitions of an OFC, their scope, influence and their positive characteristics which attract foreign funds and investment.

Chapter 2 introduces the organisations behind the initiatives against OFCs. It reveals the policy approaches towards OFC practices of the Organisation for Economic Co-operation and Development (OECD) and the Financial Action Task Force (FATF) and subsequent developments. On the private sector side, the Wolfsberg Principles have emerged, with a similar approach to the FATF Recommendations against money laundering.

Chapter 3 explores two concerns of the initiatives; harmful tax practices, which includes tax evasion and money laundering. It examines the laws, or the lack there of, to fight tax evasion and money laundering.

Chapter 4 investigates the OFCs' confidentiality and exchange of information positions, both common foundations of offshore financing. It presents the arguments for privacy and confidentiality in OFCs and how they can aid in the fight against money laundering without forgoing the confidentiality principle. Exchange of information can involve co-operation between nations thereby bringing into the picture sovereignty and the comity principle.

Chapter 5 traces the responses of the principal OFCs to the concerns of the OECD and the FATF, as being havens for money laundering and tax evasion. It explores the laws and regulations of several OFCs to fight money laundering and tax evasion, through legal mutual assistance and without compromising too much of the confidentiality promised to the investors.

Chapter 6 introduces Singapore as the newly emerging wealth management centre. It shows how the English common law, regulatory bodies and authorities curb money laundering, participate in mutual legal assistance, and yet provide the same confidentiality and solid banking infrastructure as the leading wealth management centre, Switzerland.

Chapter 7 concludes the analysis of the directives and recommendations of the supranational organisations and the responses of the major OFCs. It demonstrates how Singapore is emerging as another jurisdiction of choice, as it has satisfied the recommendations of the OECD, FATF, FSF and Wolfsberg Principles in terms of harmful tax practices, money laundering, confidentiality and exchange of information. This position is further reinforced by the number of major international banks and financial institutions establishing major presences in Singapore.

Introduction

'Havens facilitate the plunder of public funds by corrupt elites in poor countries, which can represent a major barrier to economic and social development'.[1] This observation which was made by Oxfam, reflects popular sentiment concerning the detrimental practices facilitated by Offshore Financial Centres (OFCs). However, OFCs are an integral part of the global economy albeit an integral part of each of the formal and informal economies. At their simplest, OFCs may be conceptualised as providers of financial services by banks and other financial institutions to non-residents.[2] The definition provided by the International Monetary Fund (IMF)[3] as to what constitutes an OFC is: 'a centre where the bulk of the financial sector is offshore on both sides of the balance sheet, (that is the counter-parties of the majority of financial institutions' liabilities and assets are non-residents), where the transactions are initiated elsewhere, and where the majority of institutions involved are controlled by non-residents.' The IMF has also provided a typology that classifies offshore centres into three categories:[4]

- International Financial Centres (IFCs): provide a complete range of financial services, have advanced settlement and payment systems, support large domestic economies with deep and liquid capital markets, and have a regulatory framework

[1] Policy Department of Oxfam (Great Britain), *Tax Competition and Havens,* from Oxfam's Presentation for UN Financing for Development NGO Hearings (7 November 2000) 2.
[2] International Monetary Fund, Monetary and Exchange Affairs Department, *Offshore Financial Centres – The Role of the IMF* (2000) <http://www.imf.org/external/np/mae/oshore/2000/eng/role.htm> at 10 July 2004.
[3] Ibid.
[4] International Monetary Fund, Monetary and Exchange Affairs Department, *Offshore Financial Centres –IMF Background Paper* (2000) <http://www.imf.org/external/np/mae/oshore/2000/eng/back.htm> at 10 July 2004.

that is adequate to safeguard the integrity of their financial system. They include London, New York, and Tokyo amongst others.

- Regional Financial Centres (RFCs): have developed financial markets and provide a wide range of financial services, have advanced settlement and payment systems, and have a regulatory framework that is appropriate for the structure and nature of their financial system. However, RFCs tend to support smaller domestic economies and consequently act primarily as intermediaries for the flow of funds into and out of the region in which they are located. They include Bahrain, Hong Kong, and Singapore amongst others.
- OFCs: provide a range of specialised financial services to major financial institutions, have an adequate infrastructure, but limited resources to intermediate the flow of capital into the region in which they are located, tend to be lightly or flexibly regulated, have low or no taxes, and usually have bank secrecy laws that vary in their degree of rigour. OFCs tend to be small economies and while many financial institutions will register as being resident in these jurisdictions, these financial institutions will often, although not always, have little or no physical presence. They include Bermuda, Cayman Islands, and British Virgin Islands amongst others.

For the purpose of this thesis, RFC's such as Hong Kong and Singapore, are considered part of the OFC group. Hong Kong (also under threat from Shanghai) acts as the intermediary for capital flows in and out of China, from regional sources such as Taiwan and South Korea. Singapore, on the other hand, with its developed financial infrastructure, is the financial clearing house for funds from Indonesia to the south and Malaysia and Thailand to the north.

The money flowing through OFCs is considerable and for several OFCs these flows support a financial services industry that accounts for a significant portion of their Gross Domestic Product (GDP). Based on data provided by the Bank for International Settlement (BIS), the IMF has calculated that on-balance sheet cross-border assets held by OFCs in 1999 amounted to approximately US$4.6 trillion.[5] An accurate assessment of the size of the OFC sector, however, remains impossible to calculate as the BIS is unable to collect accurate information. Smaller and more secretive OFCs do not submit information to the BIS. Meanwhile, OFCs do not tend to report information on the nationality of the associated lending and repository banks operating in their jurisdictions. At the same time, the BIS is usually unable to obtain information on off-balance sheet transactions concerning assets held by non-bank financial institutions.[6] The effect of the incomplete nature of this information is to magnify the transparency problem.[7] Lack of transparency has also meant that trade statistics for the global economy remain inaccurate as the trade accounts for individual countries do not reflect the real position of their economies. In turn, these inaccuracies can affect a country's credit rating within the financial markets. Such inaccuracies, however, are nothing new for as long ago as 1984, the balance of trade statistics for the global economy indicated that the world was running a current account deficit with itself of US$100 billion.[8] The important point is that a lack of transparency and accurate information on financial flows moving through the global economy makes questionable, detrimental, and nefarious activities, considerably more

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[5] Ibid.
[6] Ibid.
[7] It also contributes to volatility in short term financial flows, which can have destabilising influences on the global economy. In this respect, see the work of Financial Stability Forum (FSF), *Report of the Working Group on Capital Flows* (2000) <http://www.fsforum.org> at 25 April 2003.
[8] R T Naylor, *Hot Money and the Politics of Debt* (1987) 11.

difficult to detect. Where opacity prevails, abuse of the financial services offered in the formal economy by actors in the informal economy becomes possible, while it is through this exploitation that the formal and informal economies become entwined.[9]

While the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate has expressed concern about OFCs, the Committee on Banking and Financial Services of the House of Representatives has recognised that the services offered by OFCs can also be put to legal and beneficial purposes:[10]

> Not all offshore financial centres are havens for money laundering, of course, and indeed, there are many legitimate reasons for corporations and citizens from other countries to transact business in such jurisdictions, including minimisation of tax exposure, freedom from exchange controls, and concerns over personal privacy or security. Offshore financial centres are also an integral part of a capital markets system in which funds are transferred electronically around the globe in search of the highest rate of return.

In respect of the Committee's comments, some of these legal and beneficial purposes include the following. First, the low tax regimes offered by OFCs can be used to optimise profits by minimising income, corporate, withholding, and other taxes. Second, financial structures can be created that allow financial institutions to make better use of their capital by minimising the impact of requirements that obligate them

[9] Kris Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) 225-7.
[10] *International Counter-Money Laundering and Foreign Anticorruption Act of 2000*, 3 USC § 302 (2000).

to hold capital in reserve on their balance sheets. Third, the company formation and management facilities provided by OFCs can be used to add flexibility to corporate structures. Fourth, secrecy and confidentiality provisions embedded within the laws of OFCs mean that companies can protect proprietary information, for example, by creating companies in these jurisdictions to hold intellectual property and other assets that are sensitive to public exposure. Fifth, the flexible regulatory regimes offered by OFCs can be used to avoid foreign exchange and capital controls and other obstacles that hinder trade. While they may be the most noteworthy services offered by OFCs, financial secrecy services are not the most important. Even if financial secrecy laws were eliminated in all OFCs tomorrow, the financial activity being routed through these jurisdictions would still be substantial. The Cayman Islands and its prominent position within the financial markets typifies the viable and profitable role which OFCs perform, having signed the Tax Information Exchange Agreement with the US in November 2001, to provide for exchange of information upon request, in respect of criminal and civil tax matters.[11]

It is in the context of these benefits that this thesis has its origin. OFCs are an indelible part of the international financial framework. Given the recent developments that seek to counter the perceived threat to the Organisation for Economic Co-operation and Development (OECD) economies, it is useful to identify an OFC which meets the requirements of the various groups concerned about OFCs. This thesis argues that, following a close examination of the requirements of the different initiatives, Singapore can be shown to meet those requirements. That and other advantages make Singapore a compliant jurisdiction of choice.

[11] Hinterseer, above n 9, 229.

In order to determine what is an effective OFC, it is important to examine the different aspects of an OFC. Chapter 1 explorers the nuances of the terminology and provides a current definition of an OFC. It goes on to distinguish offshore from other centres, provides an insight into the features of an OFC and gives examples of different OFCs.

From Chapter 1 it is evident that there would be concerns among developed economies about some features of OFCs. Chapter 2 provides the background to the various supranational directives that have arisen in response to these concerns about havens of low taxes, secrecy and money laundering. The OECD's intentions were made known by *the Harmful Tax Competition: An Emerging Global Issue* report[12] which was first released in 1998 and which was followed by 3 reports[13] tracing the progress of the project to reduce harmful tax competition. The Financial Action Task Force (FATF) was involved through its issue of 40 recommendations in 1998 which aimed at combating money laundering. Since then, the FATF has released 4 reviews, one in each of the years 2000 to 2003,[14] tracing the developments and updating the list of non-cooperative countries and territories to its anti-money laundering recommendations. The Financial Stability Forum (FSF) recognised the lack of financial infrastructure and co-operation which made some OFCs open for abuse and illegal activity. Its main aim in increasing transparency and adhering to international

[12] Organisation for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue* (1998 OECD).

[13] The three reports released by OECD are: *Towards Global Tax Co-operation, Progress in Identifying and Eliminating Harmful Tax Practices* in 2000, *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* in 2001 and *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* in 2004.

[14] Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2000), (2001), (2002) and *Annual Review of Non-Cooperative Countries or Territories* (2003) <http://www1.oecd.org/fatf> at 25 April 2004.

financial regulatory standards was represented by its *Report of the Working Group on Offshore Centres*, which was delivered to the FSF's secretariat on April 5, 2000.[15] As illustrated in Chapter 2, the concerns of the FSF overlap some of OECD's and FATF's. Noticing the importance of these three supranational organisations, the private financial and banking sectors sought to improve their regulations such that they fell in line with the OECD, FATF and FSF, through the Wolfsberg Anti-Money Laundering Principles.[16] These principles were initiated by 11 banks and were made with the FATF's Recommendations in mind, with the slight difference that the parties involved are not countries, but banks.

While Chapter 2 discusses the measures undertaken by the supranational organisations, Chapters 3 and 4 present the four issues which are the focus of those measures: harmful tax practices, money laundering, offshore confidentiality and disclosure of information. Some or all four factors are evident in the OFCs. Chapter 3 examines harmful tax practices, tax evasion and money laundering, revealing the pace of the OECD's project to curb harmful tax practices and the introduction of The USA Patriot Act[17] which allowed easier access to foreign-based records in the US with the intention to stamp out tax evasion and money laundering. Chapter 4 examines offshore confidentiality, which is one of the key characteristics of OFCs and the exchange of information between OFCs and the countries whose citizens own assets in the OFCs. As this involves cross-border issues, the principles of comity and sovereignty are discussed.

[15] Financial Stability Forum, *Report of the Working Group on Offshore Centres* (2000 FSF).
[16] The Wolfsberg Group, *Wolfsberg Anti-Money Laundering Principles on Private Banking* (2002) <http://www.wolfsberg-principles.com/privat-banking.html> at 10 July 2004.
[17] The full title of the act is 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001'.

Chapter 5 presents the responses of principal OFCs to the OECD's and FATF's claims that they are tax havens and are open to illicit behaviour and exploitation through money laundering. Investigations into the OFCs reveal regulations to prevent the very concerns which the OECD and FATF have stated in their reports. All this has been done without compromising the confidentiality pledged to investors. This chapter also reveals the responses of OFCs to the OECD's unflattering report of their involvement in harmful tax practices. Several issues are examined, such as: lack of involvement in the discussions of the subjects which were being reported; the uneven examination of the OFCs and OECD member countries which have similar characteristics of an OFC; the possibility of undermining sovereignty of the OFCs, which weakened the OECD report; and the demonstrated intention of the OFCs to prevent money laundering and harmful tax practices through law and regulations while protecting the confidentiality of their clients.

Chapter 6 analyses Singapore, which is another alternative to an OFC, with its compliant jurisdiction in place to adhere to the OECD's views against harmful tax practices, the FATF's aim at preventing money laundering and the Wolfsberg Principles practiced by the branches of the 12 major international private banks (ABN AMRO Bank N.V., Bank of Tokyo-Mitsubishi Ltd., Barclays Bank, Citigroup, Credit Suisse Group, Deutsche Bank AG, Goldman Sachs, HSBC, J.P.Morgan Private Bank, Santander Central Hispano, Société Générale and UBS AG) represented in Singapore. Fortified by law and regulations, the sound financial infrastructure is recognised by the growing amount of assets under management of the banking and financial sector of Singapore. The vote of confidence by foreign investors continues to strengthen in the island Republic.

However, the latest June 2004 report by OECD entitled *A Process for Achieving a Global Level Playing Field*,[18] seeks to prevent this migration of business, and thus will pose a challenge that is to be addressed by Singapore and the other named significant financial centres.[19]

Chapter 7 concludes this thesis with a summation of the four identified major concerns of the OECD and FATF. Harmful tax practices, money laundering, confidentiality and exchange of information were discussed extensively in their reports. In response, the OFCs have presented regulations which are in place or are being drafted to nullify the accusation of being a harmful tax haven for money laundering and other illicit activities. The thesis concludes that Singapore is emerging as the new jurisdiction of choice for global wealth management. Singapore has in place the required infrastructure of a RFC, yet it has remained focused on the OECD's and FATF's recommendations against harmful tax practices and money laundering, all the while respecting the confidentiality of the investors.

Why is this thesis significant? As a result of the supranational initiatives being applied, new rules by the regulatory bodies are being formulated to facilitate the cross-border exchange of financial information. These new rules fuel concerns that information is being collected and exchanged without regard for financial privacy and human rights. Public scepticism is rife concerning the ability of governments to prevent unauthorised access to information and to resist the temptation to access such

[18] Organisation of Economic Co-operation and Development, *A Process for Achieving a Global Level Playing Field* (2004 OECD).
[19] Besides Singapore, the other significant financial centres named are: Andorra, Barbados, Brunei, Costa Rica, Dubai, Guatemala, Hong Kong-China, Liberia, Liechtenstein, Macao-China, Malaysia (Labuan), Marshall Islands, Monaco, Philippines and Uruguay.

information for political, economic or other purposes. There are also concerns that information is being collected in an indiscriminate, rather than risk-based, manner.

To date, these new rules are being shaped solely by the developed countries, more specifically, members of the OECD, which seek to maintain control over this segment of the global economy. Offshore financial centres which are not members of the OECD ("Non-OECD OFCs"), the small and developing economies ("SDEs"), and trust and estate professionals, feel that they have been relegated to a subordinate role in the formulation of these rules.

There is uncertainty about a process for change controlled by the dominant participants in the global market for financial services. In particular, a flawed process premised on a restricted perspective will lead to flawed conclusions and fail to achieve the stated objectives of all parties. Business will simply migrate to jurisdictions overlooked or excused from full compliance with the new rules. There is a counterview that calls for new regulation premised on a truly level playing field, one in which all countries conducting cross-border financial services participate on an equal basis in setting the new standards which will affect them.

Trade in services is a rapidly expanding component of global trade. Many of the smaller jurisdictions competing with the OECD member countries in the provision of international financial services already have regulatory environments which meet or exceed standards existent in OECD member countries. The design of global rules for the conduct of trade is more universal for supranational bodies such as the World

Trade Organisation (WTO) which utilises processes developed to lessen inequities being imposed on smaller and developing countries.[20]

There has also been a shift in emphasis in the structure of the offshore world and market environment for regulators, advisors and company and trust service companies. In the late 1990's and especially in the 21st century, the move to fewer, better offshore financial centres has gathered pace. The legislative and supervisory changes required by international agencies have, in fact, created a more transparent and more professional regime. Those centres which remain in five years will embody leading edge approaches to regulation and service development.

One of the more evident trends of the past five years has been the emergence of low tax rather than no tax jurisdictions. Even though the Isle of Man and Gibraltar have committed to a zero-based corporate tax environment, for the vast majority of OFCs the reality of acceding to the will of the OECD, the IMF, the European Commission (EC) and the FATF has been that zero tax is no longer on the agenda.

For the more diverse and experienced centres like Jersey, the Isle of Man, Guernsey, Singapore and the Bahamas, participating in the formulation of internal regulation represents a future of greater co-operation where information may be exchanged, more business is referred and the world becomes somewhat less hostile. A key selling point of these jurisdictions is the modernity of their regulation. They have moved in a

[20] Kyle Baguess and Robert W Staiger, 'Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO' (2003) *Journal of International Economics Department of Economics*, Columbia University Discussion Paper Series.

few short years from an absence of any regulation to becoming vibrant examples of creative and appropriate regulation.[21]

All seriously-minded OFC's today demonstrate an independent regulator, usually in the form of a financial services commission, with a financial intelligence unit to handle suspicious transactions reports. What will distinguish offshore centres in the future is not the quality of their regulation – as that is a prerequisite. Instead it will be the quality of service provision, the diversity of talent – the depth in the advisory community, and creativity and innovation in products and services.[22]

This thesis sets out the initiatives introduced by the supranational agencies, the issues that these reports highlight, and the regulatory responses by the leading OFCs.

The conclusion, as Reynolds[23] has identified, is the emergence of Singapore as a financial centre with the attributes of an OFC, the credibility of an IFC and the depth of financial and legal infrastructure and innovative legislation to attract the second largest amount of managed funds outside of Switzerland. The thesis of this study is that Singapore is now becoming the new global wealth management centre for investors.

Sound fundamentals have inspired confidence in Singapore as a wealth management centre. Socio-political stability, a strong domestic economy, a clean and efficient legal infrastructure, best practice in financial sector regulation and supervision standards,

[21] Guernsey is a good example. When the UK's Financial Services Authority failed to act on the split capital scandal it was the Guernsey Financial Services Commission which blew the whistle. Bob Reynolds, 'Editor's Notes' (2003) 8 *Offshore Red: An OFC News Update*, 129.
[22] Ibid.
[23] Ibid.

and a ready pool of experienced professionals have attracted the world's top 20 private banks and more than 30 of the top 50 US and European fund managers to set up in Singapore, serving Asia and beyond.[24]

[24] Monetary Authority of Singapore, *Wealth Management in Singapore* <http://www.mas.gov.sg> at 25 November 2003.

Chapter 1: What Is Offshore

1.1 Introduction

This chapter sets out to define what is an offshore financial centre. With a clear definition, description of an OFC's features and examples of OFCs, it is possible to understand the background to the supranational initiatives against OFCs.

The term "offshore" was used originally to refer to the tax havens off the shores of the United Kingdom and the United States, and by extension to any company or trust located in a tax haven or a country where tax could be kept low. In the context of financial transactions, the term 'offshore' refers to transactions which take place between non-residents. By this definition 'offshore transactions' can take place in any jurisdiction, but as a result of their fiscal and secrecy rules, some jurisdictions attract a very high number of offshore transactions and offshore banks, and have thereby become known as offshore financial centres.[25]

Spitz asserts that the main new development is the amount of money offshore and the vast increase in the number of persons participating in offshore activities. He states that, never before have so many offshore companies and trusts been set up or have so many expatriates changed residence for purely fiscal reasons. His second point it that, there is the increase in the number of countries offering tax haven or finance centre possibilities. In particular, he states the seeming high tax jurisdictions are actively seeking new "offshore" business. His third point is that, the offshore area is found to

[25] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (2000) 93.

be widening its scope of offshore transactions and operations. Spitz argues that the esoteric is becoming more and more commonplace, and there is an ongoing merging of onshore and offshore. [26]

1.2 Scope of Offshore

Offshore goes well beyond tropical islands. Barker reports some interesting statistics.[27] There are now almost seventy offshore financial centres in the world, many within the jurisdiction of major economic powers with ostensibly high levels of taxation. The sums involved are huge. For example, the Cayman Islands is reported to be the fifth largest banking centre in the world, having approximately 580 banks (with $500 billion[28] in holdings), 2,238 mutual funds, 499 insurance companies and 40,000 offshore entities in total. The Bahamas is also another major centre, with sixty insurance companies, 580 mutual funds, 418 banks and 100,000 offshore entities in total. The Channel Islands and the Isle of Man have approximately $525 billion in foreign-owned assets. Financial services account for 80% of Isle of Jersey's income, the minimum non-resident account being $100,000. Switzerland, the world's largest private banking centre is managing about US$1.2 trillion of offshore assets while Singapore's offshore funds are estimated at US120 billion.[29] In all, statisticians estimate that about $8 trillion worldwide is invested in offshore accounts and entities.[30]

[26] Barry Spitz, *International Tax Havens Guide* (1999) 3.
[27] William B Barker, 'Optimal International Taxation and Tax Competition: Overcome The Contradictions' (2002) 22 *Northwestern Journal of International Law & Business* 161.
[28] For all currency mentioned in the thesis, unless otherwise specified, it is in United States dollars.
[29] Koh, Francis, Lee, Choon Li, and Jindai, Parthsarthi, 'Singapore as an Emerging Hub for Wealth Management' (2003) November *Pulses* 16.
[30] Barker, above n 27.

1.3 Terminology: Offshore and Tax Havens

The term "offshore financial centre" or OFC, is now the more "politically correct" term for what used to be called a "tax haven". However, the difference in vocabulary does make the important point that a jurisdiction may provide specific facilities for offshore financial centres without being in any general sense a tax haven.[31]

Chetcuti's paper, *Compliance vs. Competitiveness: Adapting to the new international legal order* shows the difficulty in defining the terms, 'tax havens' and 'offshore financial centres'.[32] He asserts that, not only countries which we usually call 'tax havens' engage in the provision of offshore financial services. While London, New York, Frankfurt and Tokyo are among the largest offshore financial centres, Chetcuti states that none of these deserves the nomenclature of 'tax haven'. Nor are these centres typically regarded as OFCs. The difficulty of definition is evident from the recent discrepancies present in the various rankings or black lists issued by the OECD, FATF and the Financial Stability Forum (FSF).

In an attempt to narrow the scope of the definition, many have sought to define an OFC as a financial centre where the larger part of the financial service activity carried on is in respect of non-residents. Nonetheless, in absolute terms more offshore business can be expected to be undertaken through London or New York than the OFCs so more narrowly defined. Then there is the problem of categorising centres

[31] Spitz, above n 26, 4.
[32] Jean-Philippe Chetcuti, *Compliance vs Competitiveness: Adapting to the new international legal order* (2002) < http://www.chetcuticauchi.com/jpc/research/international-initiatives-0.htm> at 25 April 2004.

such as Luxembourg and Switzerland who dislike the "offshore" label given them by the G8[33] and FSF. There are also substantial differences between well established centres such as Hong Kong, Singapore, Jersey, Guernsey and the Isle of Man, which can be compared with Luxembourg and Switzerland in the range and level of financial services provided, and islands in the Pacific and Caribbean which engage in providing financial services to non-residents on a much more limited scale and with a much narrower range.

Irrespective of definition, the trend internationally is to distinguish "not between onshore and offshore centres, but between centres which comply with international standards and those which do not."[34]

The majority of the offshore financial centres world-wide are 'have-not' countries that rely on financial services to provide them with much needed employment and tax revenues resulting from foreign company registration, bank services and trust management. A concerted effort by the developed nations to curtail these activities will most certainly hamper these developing nations in their effort for financial autonomy and political sovereignty.[35]

The differences between offshore countries and home countries have also become blurred. In the struggle between states to attract investment in the face of high business costs (whether the costs be associated with expensive labour in developed countries or with lack of infrastructure in developing countries), many high tax

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[33] Group of Eight, which consists of Canada, France, Germany, Italy, Japan, Russia, United Kingdom and United States.

[34] Chetcuti, above n 32.

[35] Matt Blackman, 'Still in the Line of Fire' (1999) *Shore to Shore* <http://www.goldhaven.com/LineofFire.htm> at 25 November 2003.

jurisdictions act like tax havens, offering low tax burdens as an incentive to business. For instance, after lower tax or incentive countries attracted a substantial share of the world's shipbuilding (and the jobs associated with shipbuilding) away from home countries, many home countries began offering tax incentives in an attempt to lure the shipbuilders back.[36]

1.4 Role of Tax Havens in International Finance

Regardless of the factors which influenced the development of the individual tax havens, all of those centres have become production interfaces linked to, yet separate from, onshore world capital markets and invisible production centres. The establishment of a network of such centres[37] has constituted a new secondary trading system that is global in scope, unlike the largely intra-continental systems that preceded it. Motivated by economics of convenience, these offshore havens have served as an international common property resource for trans-national private-sector business in at least five basic respects: [38]

(i) As centres of domicile through which international companies can incorporate and operate commercial holding companies and overseas subsidiaries in the most advantageous fiscal climate subject to minimal exchange control.

(ii) As holding companies, which are used predominantly to control industrial or investment companies by holding major shares, to finance companies in a group by generating funds through the floatation of bond issues, and, not least, to receive dividends, interest, or royalty and licensing payments.

[36] Spitz, above n 31, 5.
[37] Whether based on the Euromarkets or trans-national banking.
[38] Anthony Sanfield Ginsberg, *Tax Havens* (1991) 63-8.

(iii) As locations from and through which to exploit international capital and money markets with a greater freedom of action than might be feasible from their countries of origin. Eurobonds create an urgent need for the services of countries with favourable tax legislation, such as an absence of withholding tax on interest and dividends, regardless of the bondholder's residence. Because Eurobonds are bearer securities that protect the anonymity of the holder, this is particularly important for the growing category of Eurobond investors who have taken care to arrange their affairs so that they escape liability to tax anywhere.

(iv) As secure havens for international earnings, savings, and pools of liquidity for investment in a tax-neutral environment.

(v) As assembly centres for components produced externally in on-shore centres and re-exported on-shore, through free trade zones.

Hence, OFCs have found themselves under attack. They are accused of introducing practices designed to encourage non-compliance with the tax laws of other countries. More specifically, they have been accused of allowing themselves to be used to hide drug money, for tax fraud, for the circumvention of foreign inheritance laws and for money laundering and the promotion of corruption in general, with the implied assumption that all the money they held came there illegally.[39]

1.5 Offshore versus Onshore Institutions

[39] Elias Neocleous, *Offshore financial centres - Recent developments* (2002) The Legal 500 < http://www.legal500.com/devs/cyprus/of/cyof_001.htm> at 22 October 2003.

International tax planning has matured past a point of the mere establishment of holding structures and private accounts in offshore jurisdictions. International tax planning now includes such choices as where to operate the production plant, where to locate technology development, where to base the multinational information centre, and where to place service centres. Alongside established participants such as the Netherlands, Luxembourg, and Switzerland, countries like Ireland, Belgium, and Cyprus have become aggressive players in offshore/international tax planning procedures.[40]

OFCs play a key role in facilitating the growing mobility of finance and the shaping of complex webs of interactions and relationships involving the nation-states, multinational corporations, the wealthy elite and ordinary citizens.[41] The emergence of multi-tasked financial institutions located in tax havens, as opposed to traditional bank organisations located in home jurisdictions, has expanded and diversified international finance. Multinationals, through years of shifting their funds offshore to escape uncompetitive tax burdens, now operate their own financial companies in competition with home jurisdiction banks. Companies can often provide, at a reduced cost, their own project financing, their own insurance, and just about any other service that used to be sourced from home institutions.

Offshore offers the potential for tailored financing, which has led to the development of financial instruments offering an array of variations in types of interest, maturity dates, advance refunding and conversion possibilities. Offshore offers the potential for structured insurance and reinsurance. Many high-risk insurance policies (such as

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[40] Spitz, above n 36, 7.

[41] Prem Sikka, 'The Role Of Offshore Financial Centres In Globalization' (2003) 6(4) *Journal of Money Laundering Control* 311.

political risk or environmental casualty) could not be written onshore because of government regulation and taxation, and many insurance companies would be forced to significantly increase premiums if they were not allowed to reinsure groups of risk.

If an offshore centre attracts a poor reputation, corporate work shifts elsewhere. For an offshore jurisdiction, reputation means everything. [42]

1.6 What do the Offshore Centres offer

The principal products stocked by the offshore supermarkets are companies and trusts. "Offshore companies" usually hold investments and may be involved in trading. "Offshore trusts" protect the ownership of assets and, frequently of the companies themselves. The ultimate beneficiaries are usually individuals residing in high tax countries.

The number of offshore companies is expanding exponentially. They are put there for a very good reason: An offshore company can be used for any purpose for which a company in a high tax country can be used, and it generally does not have to pay tax in the offshore jurisdiction. The bulk of offshore companies simply collect income consisting of dividends, loan interest or patent royalties, and licence fees. But many are also used for business purposes. Structured correctly, the offshore company plays a turntable role using tax-exempt income to make more tax-exempt income. Apart from tax, an offshore company can be used for other purposes such as privacy and freedom from exchange control, or protection of assets against future developments in

[42] Spitz, above n 40, 7-8.

the home country. Though companies in most offshore jurisdictions offer basic similarities, there are useful differences. For example, what information must be contained in the bylaws? Can the true promoters and beneficial owners be kept entirely out of the picture? What are the costs of incorporation? How much time is involved, and can it be accelerated? Are there limits on the powers of the company? Is there any limitation of liability? Can there be bearer shares, no par value shares, preference shares, and redeemable shares or shares with special rights?[43]

The offshore trust is, in reality, a mutant designed specifically to meet the needs of offshore investment. Orthodox trust law rules have been modified to make the trust more commercially viable and mobile. These include laws relating to bankruptcy and enforcement of creditors' claims which preserve the integrity of offshore assets and provisions specifying the governing law of the trust and jurisdiction. The offshore trust is often closely linked to other offshore companies and, consequently, there exist changes to company law complementary to the offshore trust. The legal source for the offshore trust is statutory. The offshore trust itself, like its international business company or offshore company neighbour, is bound by confidentiality rules.[44]

Offshore service providers are now moving up the value chain and creeping into more of a company's myriad business processes. Services range from functions requiring low technical training and no direct user contact to "front office" tasks, where outsourced personnel handle customer contact and provide interactive responses, such

[43] Ibid, 9-10.
[44] Rose-Marie Antoine, *Confidentiality in Offshore Financial Law* (2002) 13.

as remote online help-desk assistance, and, at a still higher level, telemarketing, customer care, and medical-or insurance-claims resolution with customers.[45]

An example of a different approach is Switzerland, which has traditionally been the world's guardian of bank secrecy, and now is being pressured towards some openness. This has been good for banking business in Austria, where secret savings accounts, available without any proof of identity, are eagerly promoted. Although theoretically restricted to Austrian citizens, there are an estimated 26 million savings accounts and an Austrian population of 8 million.[46] This practice is considered by the European Union as "a flagrant breach of the principle of identification". This is outlined in the European Union (EU) anti-money laundering directive 91/308/EEC,[47] which requires banks to know the identity of their customers. As discussed in subsequent chapters, severe pressure is currently being brought to bear on onshore and offshore jurisdictions to fight money laundering.

Singapore, as discussed in chapter 6, has not traditionally been considered a part of the offshore industry, offering such trust and offshore company facilities. However whilst providing an openness as such, it is now like Austria, beginning to capture some of this offshore activity and business.

As offshore outsourcers add value, it is possible to envisage a global economy in which key elements of customer relationships and the delivery of a company's core

[45] William Bierce, *Staying Afloat When Going Offshore* (2002) Optimize <http://www.optimizemagazine.com/issue/008/law.htm> at 25 April 2004.
[46] Ibid.
[47] *Council Directive (EC) No 91/308/EEC of 10 June 1991 Prevention of the Use of the Financial System for the Purpose of Money Laundering* [1991] OJ L 166, 77.

business services are integrated and supported by offshore suppliers – rather than the company itself.[48]

1.7 Types of OFCs

According to Spitz, there are five basic types of OFCs, many of which are known as tax havens:[49]

1 Countries that have no income tax or that grant extensive tax exemptions;

2 Countries that only tax locally generated income (territorial basis of taxation that exempts foreign income);

3 Countries that combine features of (1) or (2) with a treaty network;

4 Low tax financial centres in countries offering special legislation; and

5 High tax countries offering special incentives for offshore companies and qualifying holding companies.

Examples of OFCs by category are set out below in a non-exhaustive list:[50]

1 Countries that have no income tax or that grant extensive tax exemptions: Andorra, Anguilla, the Bahamas, Bahrain, Bermuda, Brunei (individuals), Campione, the Cayman Islands, the Cook Islands, French Polynesia, Grenada, Kuwait, Maldives, Monaco, Nauru, Oman (individuals only), the Turks and Caicos Islands, United Arab Emirates, Uruguay, Vanuatu.

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[8] Bierce, above n 45.
[9] Spitz, above n 43.
[0] Ibid.

2 Countries that impose no income tax on foreign source income: Costa Rica, Djibouti, Dominican Republic, Ecuador, France (special rules), Guatemala, Hong Kong, Ireland (non-resident company), Jordan, Kenya, Lebanon, Liberia, Macau, Panama, South Africa, Uruguay, Venezuela, Singapore.

3 Countries that can be used as low tax areas but also have certain tax treaty benefits: Cyprus, the Netherlands, the Netherlands Antilles, Switzerland.

4 Low tax financial centres and countries offering special incentives and privileges: Angola, Anguilla, Antigua, Barbados, the British Virgin Islands, Brunei, Cyprus, Gibraltar, Grenada, Guernsey, Hong Kong, Ireland, the Isle of Man, Jamaica, Jersey, Liechtenstein, Luxembourg, Macau, Madeira, Malta, the Marshall Islands, Mauritius, Montserrat, the Netherlands, Nevis, Philippines, Puerto Rico, San Marino, Seychelles, Solomon Islands, Sri Lanka, St. Helena, St. Vincent, Switzerland, Tuvalu, Western Samoa.[51]

5 High tax countries offering special incentives and privileges for offshore companies and qualifying holding companies: Belgium, Cyprus, Denmark, France, Germany, Luxembourg, the Netherlands, the Netherlands Antilles, Singapore, Spain, Switzerland, the United Kingdom.

1.8 Conclusion

[51] Certain countries mentioned in this point also offer tax treaty benefits.

From the above definitions and developments of OFCs, it can be seen why their success has provoked closer scrutiny by the international community and regulatory agencies, which have become less tolerant of the kind of competition offered by OFCs. On 26 June 2000, the OECD published its report on harmful tax practices and identified 35 tax havens that would face sanctions if they did not cooperate.[52] A week earlier, on 22 June 2000, the FATF report on Money Laundering named 15 jurisdictions that did not sufficiently combat hot money[53]. Moreover, on 26 May 2000, the FSF identified 37 jurisdictions which were financial centres with significant offshore activities.[54] The recent 2003 EU agreement on a system of tax on savings income that aims to abolish bank secrecy also affects OFCs, as the agreement is dependent on equivalent measures being negotiated with third country financial centres.[55] Therefore, never before has the pressure been so high on the OFCs.[56] The nature of this pressure is analysed in Chapter Two.

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[52] Organisation for Economic Co-operation and Development, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (2000 OECD).

[53] Hot money is most often associated with capital flight, which itself will be a combination of clean, grey (associated with illegal activity), and dirty money (associated with criminal activity), depending on the circumstances. Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2000).

[54] Financial Stability Forum, *Report of the Working Group on Offshore Centres* (2000 FATF).

[55] *Council Directive (EC) No 2003/48/EC of 3 June 2003 Taxation of Savings Income in the Form of Interest Payments* [2003] OJ L 157, 38.

[56] Mattias Levin, Centre for European Policy Studies research report, *The Prospects for Offshore Financial Centres in Europe* (2000).

Chapter 2: Supranational Directives and their Progress

2.1 Introduction

The definitions and features of OFCs outlined in chapter 1 show the rationale for the supranational initiatives against OFCs that emerged over the last fifteen years. Understanding the initiatives and OFCs responses to them, is critical in determining which OFCs are jurisdictions of choice in the current environment.

In recent years, the offshore industry and the relevant jurisdictions have faced enormous challenges in relation to their status as 'tax havens' and overly broad assertions that offshore companies are being used for money laundering. The OECD and the FATF have issued several reports[57] seeking commitments to eliminate what they consider to be 'harmful tax competition' and gain greater transparency (in the case of the former) and to promote the adoption of international standards of anti-money laundering regulatory frameworks (in the case of the latter).[58] This chapter briefly describes the make-up of the relevant regulatory bodies. It then sets out and analyses the reports and recommendations of the OECD and FATF. The last sections analyses the Wolfsberg Principles which are the product of the efforts of the private sector to reduce and prevent money laundering in line with several of the FATF's 40

[57] Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2000 FATF), Financial Action Task Force, *Annual Review of Non-Cooperative Countries or Territories* (2003 FATF), Organisation for Economic Co-operation and Development, *International Tax Avoidance and Evasion* (1987 OECD), Organisation for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue* (1998 OECD), Organisation for Economic Co-operation and Development, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (2000 OECD)

[58] Discussed extensively below, but see generally, Offshore Incorporations Limited, 'Offshore Jurisdictions - Ready for Stand against OECD' (September 2002) *Asian Legal Business*.

Recommendations. The analysis of the recommendations will show that the four critical issues for OFCs to address are harmful tax practices, money laundering, confidentiality and exchange of information. These are addressed in detail in the subsequent chapters.

2.2 Supranational Organisations

(a) Organisation for Economic Co-operation and Development (OECD)

The OECD is an organisation with 30 Member countries, including all members of the G8 and EU, sharing a stated commitment to democratic government and the market economy.[59] The OECD assists member governments to address the economic, social and governance challenges of a globalised economy.[60] It is also an organisation designed, and mandated to promote the interests of its Member States.[61]

(b) Financial Action Task Force (FATF)

[59] Twenty countries originally signed the Convention on the Organisation for Economic Co-operation and Development on 14 December 1960. Since then a further ten countries have become members of the Organisation. Organisation for Economic Co-operation and Development, *Ratification of the Convention of the OECD* <http://www.oecd.org> at 25 November 2003.

[60] Historically the research units within the OECD have made significant contributions particularly in the area of economics. It appears that neither these research units nor the sound methodology which they normally adopt, were involved in the production of the OECD Report.

[61] The Convention on the Organisation for Economic Co-operation and Development, Paris, 14 December 1960 at Article 1 (a) states:

> The aims of the Organisation for Economic Co-operation and Development shall be to promote policies designed to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy.

The FATF was established in 1989 and has 28 Member countries largely overlapping with that of the OECD.[62] Its primary role has been to establish standards relating to money laundering laws and practices and to work to implement these standards throughout the world. The FATF has assumed a broader mandate to combat terrorism following the attacks in the U.S.

Like the OECD, the FATF has restricted membership. Regional bodies such as the Caribbean Financial Action Task Force[63] support the work of the FATF. Although such regional bodies facilitate input from non-FATF members at a lower level, these groupings are "junior partners" in the processes undertaken by the FATF.[64]

The need to cover all relevant aspects of the fight against money laundering is reflected in the scope of the 40 FATF Recommendations which were originally drawn up in 1990. In 1996 the Forty Recommendations[65] were revised to take into account the experience gained over the previous six years and to reflect the changes which had occurred in the money laundering area.[66] They cover the criminal justice system and law enforcement; the financial system and its regulation, and international cooperation.[67]

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[62] Financial Action Task Force, *Members & Observers* (2004) <http://www1.oecd.org/fatf/Members_en.htm> at 1 June 2004. For a full list of FATF Member countries see Appendix A.

[63] Members of Caribbean Financial Action Task Force comprise Anguilla, Antingua and Barbuda, Aruba, The Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, They Cayman Islands, Costa Rica, Dominican Republic, Dominica, Grenada, Jamaica, Montserrat, Netherlands, Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Turks and Caicos Islands and Venezuela.

[64] Stikeman Elliot, *Towards a Level Playing Field – Regulating Corporate Vehicles in Cross-Border Transactions* (2002) 6-7.

[65] For a full list of the 40 Recommendations, see Appendix G.

[66] During the period 1990 to 1995, the FATF also elaborated various Interpretative Notes which are designed to clarify the application of specific Recommendations. Some of these Interpretative Notes have been updated in the Stocktaking Review to reflect changes in the Recommendations. The FATF adopted a new Interpretative Note to Recommendation 15 on 2 July 1999.

[67] Financial Action Task Force, *The Forty Recommendations* (2003 FATF)

(c) Financial Stability Forum (FSF)

The FSF's recent focus on OFCs stems from its work concerning the stability of the global financial system.[68] As an organisation, the FSF provides a cross-disciplinary forum for those interested in regulatory matters to meet, discuss, and pursue various initiatives with respect to the international financial system. At a summit of the G8's finance ministers and central bank governors on 3 October 1998, Hans Tietmeyer, the then President of the Deutsche Bundesbank, was given a mandate to prepare a report that would recommend new structures to enhance co-operation among national and international regulatory and supervisory bodies and public international financial institutions. On 11 February 2000, Tietmeyer presented his report[69] where he observed that supervisory initiatives with respect to the international financial system over the previous few years had sharpened awareness of various risk-related issues.

He asserted that the existing international regulatory framework remains imperfect because it is viewed as having been grafted onto a system of nation-states. In particular, the regulatory responsibilities remain fragmented among a number of central banks, public financial institutions, and sector-specific groups.[70] Although he identified various areas where existing supervisory arrangements could be strengthened, Tietmeyer rejected both wholesale institutional reform and a substantial reworking of existing arrangements. In other words, in his view, the nation-state is to remain the primary political construct through which regulatory issues related to the

[68] Financial Stability Forum, *Financial Stability Forum: What We Do* (2004) <http://www.fsforum.org/about/what_we_do.html> at 10 July 2004.
[69] Hans Tietmeyer, *International Co-operation and Co-ordination in the Area of Financial Market Supervision and Surveillance* (1999 Financial Stability Forum).
[70] Ibid 3.

international financial markets are to be addressed. Instead, Tietmeyer recommended the creation of an international public forum, the FSF, through which international regulatory efforts could be co-ordinated.[71]

The FSF was convened in April 1999 to promote international financial stability through information exchange and international co-operation in financial supervision and surveillance. Like the FATF, it was also established pursuant to a G8 initiative. At its inaugural meeting on 14 April 1999, the FSF established a so called "OFC" (Offshore Finance Centre) working group. The purpose of this group was to consider any potential role of financial institutions in non-OECD countries, in the stability of the world's financial system.[72]

In May 2000, the FSF encouraged OFCs to undertake needed reforms and asked the International Monetary Fund (IMF) to put in place an assessment program that would ensure progress on a lasting basis.[73] Almost all of the 42 jurisdictions that the FSF identified as having offshore financial activities have undergone an initial assessment by the IMF. These assessments identify strengths and weaknesses in relation to relevant international standards and codes and set out recommendations for improvement.[74]

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[71] Ibid 6.

[72] Stikeman Elliot, above n 64, 6-7.

[73] Financial Stability Forum, 'FSF Reviews its Offshore Financial Centres (OFCs) Initiative' (Press Release, 5 April 2004).

[74] The 42 jurisdictions are: Switzerland ,Luxembourg, Ireland (Dublin International Financial Services Centre), Jersey, Guernsey, Isle of Man, Hong Kong, Singapore, Andorra, Gibraltar, Malta, Monaco, Bermuda, Barbados, Bahrain, Macao and Malaysia (Labuan), Cyprus, Liechtenstein, Anguilla, Antigua, Aruba, Bahamas, Barbuda, Belize, British Virgin Islands, Cayman Islands, Netherlands Antilles, St Christopher and Nevis, St Lucia, St Vincent & the Grenadines, Turks & Caicos, Costa Rica, Panama, Lebanon, Mauritius, Cook Islands, Marshall Islands, Nauru, Niue, Samoa and Vanuatu. International Monetary Fund, *Offshore Financial Centres – The Assessment Program – An Update* (2004) <http://www.imf.org/external/np/mfd/2004/eng/031204.htm> at 10 July 2004.

(d) International Monetary Fund

The IMF is an organisation of 184 countries, established to promote international monetary co-operation, exchange stability, and orderly exchange agreements; to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance of payments adjustment.[75] The IMF is currently conducting assessments[76] of non-OECD IFCs, in part using discriminatory assessment criteria in the sensitive area of corporate and trust service providers, which the IMF does not apply to assessments of OECD States.[77]

In the IMF's assessment program of OFCs, the focus was placed on four areas:[78]

- Regular monitoring of OFCs' activities and compliance with supervisory standards;
- Improved transparency of OFC supervisory systems and activities;
- Technical assistance in collaboration with bilateral and multilateral donors;
- Collaboration with standards-setters and the onshore and offshore supervisors to strengthen standards and exchange of information.

(e) Links between Supranational Organisations

There is significant commonality of membership of supranational organisations seeking to control the regulation of international financial services. Essentially, with

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[75] International Monetary Fund, *IMF Member Quotas and Voting Power, and IMF Board of Governors* (2004) <http://www.imf.org/external/np/sec/memdir/members.htm> at 10 July 2004.
[76] International Monetary Fund, above n 75.
[77] The voting rights of the G8, OECD and other members of the IMF, which are set by economic contribution to the IMF, are set out in Appendix A.
[78] International Monetary Fund, above n 74.

the exception of the International Tax and Investment Organisation (ITIO) which is composed of, and funded by SDEs, the organisations are the same developed countries operating in different forums.

As the supranational organisations put out their reports containing guidelines and recommendations, the Wolfsberg Principles emerged from the private sector's attempt to combat money laundering.

The similarity of composition and the complementary interlocking programmes of these organisations are perceived by the SDEs as suggesting a single agenda, that of the major developed countries.[79] Accordingly, when one supranational body provides a recommendation or suggested course of action, endorsement from another organisation is, in substance, endorsement by the same member states. It is not an impartial validation as the process may imply to those unfamiliar with the overlapping memberships between such organisations.

For the purpose of this thesis, given the overlap across supranational organisations, each with a different focus, and the related approach of the Wolfsberg signatories, it is intended to take the three approaches of the OECD, FATF and Wolfsberg Principles to provide a broadly comprehensive range of initiatives against OFCs. In the context of these three approaches it is possible to determine what constitutes a compliant OFC jurisdiction. It will become clear that, to be a jurisdiction of choice for global wealth management, being a compliant OFC jurisdiction is essential.

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[79] See Nicholas Kochan, The Dirty War on Money Laundering (2003) Global Agenda <http://www.globalagendamagazine.com/2003/nicholaskochan.asp> at 10 July 2004 and Ronald Sanders, 'The Fight against Fiscal Colonialism: The OECD and Small Jurisdictions' (2002) 365 *The Round Table: The Commonwealth Journal of International Affairs* 325.

The remainder of this chapter provides an outline and analysis of the recommendations of each body. Chapters 3 and 4 provide a detailed examination of the key aspects of: harmful tax practices, money laundering, offshore confidentiality and exchange of information. How a jurisdiction responds to these issues is a key determinant of its attraction for global wealth management.

2.3 OECD Report on Harmful Tax Practices[80]

2.3.1 The OECD's Position

In May 1996, Ministers called upon the OECD to "develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases, and report back in 1998".[81] In response to the Ministers' request, the OECD's Committee on Fiscal Affairs launched its project on harmful tax competition. The *Harmful Tax Competition: An Emerging Global Issue* report[82] addressed harmful tax practices in the form of tax havens and harmful preferential tax regimes in OECD Member countries and non-Member countries and their dependencies. It focused on geographically mobile activities, such as financial and other service activities. The report defined the factors to be used in identifying harmful tax practices and went on to make 19 wide-ranging Recommendations to counteract such practices.

[80] Organisation for Economic Co-operation and Development, above n 12.
[81] Ibid 3.
[82] Ibid.

In approving the report on the 9 April 1998,[83] the OECD Council adopted a Recommendation to the Governments of Member countries and instructed the Committee to pursue its work in this area and to develop a dialogue with non-member countries. Luxembourg and Switzerland abstained from voting in Council on the approval of the report and the adoption of the Recommendation.

The existence of low or no income taxes is not in itself enough to constitute harmful tax competition. Rather, when low or no taxes are combined with other legislative or administrative features, such as "ring-fencing", a lack of transparency, or the absence of exchange of information, it was asserted then harmful tax competition, may arise. The OECD report provided a framework for identifying harmful regimes and suggests counter-measures for them.[84] Accordingly, harmonising tax rates across countries or installing minimum tax levels was not the stated aim. Countries would remain free to decide their own tax rates, with checks and balances coming from competitive forces of the global marketplace.[85] It was envisaged by the OECD report that this would encourage countries to adopt "best practice" policies on taxation.

The OECD's 1998 *Harmful Tax Competition: An Emerging Global Issue* report drew a distinction between three situations in which the tax levied on income from geographically mobile financial and other service activities in one country is lower than the tax that would be levied on the same income in another country:[86]

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[83] Ibid.
[84] Ibid 26-34.
[85] Ibid 15 [26].
[86] Spitz, above n 50, 236-7.

1) the first country is a tax haven and, as such, generally imposes no or only nominal tax on that income;

2) the first country collects significant revenues from tax imposed on income at the individual or corporate level but its tax system has preferential features that allow the relevant income to be subject to low or no taxation; or

3) the first country collects significant revenues from tax imposed on income at the individual or corporate level, but the effective tax rate that is generally applicable at that level is lower than the tax rate levied in the other country.

Each of these situations may have undesirable effects when seen from the perspective of the other country. However, the report was careful not to suggest that there was some general minimum effective tax rate on income below which a country would be considered to be engaging in harmful tax practices.[87]

2.3.2 The OECD's Concept of "Tax Haven"

The OECD report defined a tax haven that conducts harmful tax competition in the three above mentioned situations and other activities such as: [88]

- Practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from a low or no tax rate.
- General lack of transparency.

[87] Ibid.
[88] Blackman, above n 35.

- The absence of a requirement that the activity be substantial (investment that is purely tax driven.)

The OECD's concept of "tax haven" thus refers to tax jurisdictions that offer themselves as a place that non-residents can use to escape tax obligations in their countries of residence. A number of factors identify these jurisdictions, in particular the virtual absence of taxes (combined with minimum business presence requirements) and a lack of legislative and administrative transparency. Bank secrecy and other features that prevent effective exchange of information are also discernible. [89]

2.3.3 The Recommendations and the Guidelines

In order to deal with harmful preferential tax regimes, OECD countries agreed to non-binding Guidelines for Dealing with Harmful Preferential Tax Regimes. They undertook to eliminate within five years of the adoption of the OECD's report on harmful tax competition (or, if a particular "grandfather clause" applies, no later than December 31, 2005) the features of those preferential tax regimes identified as harmful under the guidelines.[90]

In the latest 2004 progress report on the OECD's campaign against harmful tax practices, it was reported that while there is an overwhelming majority of countries and jurisdictions which have agreed to work towards transparency and effective exchange of information, a small number have not yet made commitments to those

[89] Spitz, above n 87, 238.
[90] Organisation for Economic Co-operation and Development, above n 85, 70.

principles.[91] These countries are identified in a List of Unco-operative Tax Havens issued by the Committee in April 2002 and revised in May 2003 and December 2003 to remove Vanuatu[92] and the Republic of Nauru,[93] respectively, from the list. The OECD was very pleased that Vanuatu and the Republic of Nauru have joined the growing number of countries that are committed to transparency and effective exchange of information and hopes that the remaining countries will follow this example. The remaining unco-operative tax havens are Andorra, the Principality of Liechtenstein, Liberia, the Principality of Monaco, and the Republic of the Marshall Islands.[94] The OECD is currently engaged in a constructive ongoing dialogue with a number of these countries and looks forward to future commitments to transparency and effective exchange of information.[95]

In addition to the tax haven list and the guidelines, both of which are of a multilateral character, recommendations were made on how the OECD countries might strengthen their domestic and bilateral measures against harmful tax practices. At the national level, OECD countries have been encouraged to adopt controlled foreign corporation (CFC) or equivalent legislation.[96] This generally enables the home country of the parent to exercise taxing rights over low taxed foreign subsidiaries that the parent

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[91] Organisation for Economic Co-operation and Development, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* (2004 OECD).

[92] Organisation for Economic Co-operation and Development, *Vanuatu Makes Commitment and is Removed from OECD List of Unco-operative Tax Havens* (2003) <http://www.oecd.org/document/41/0,2340,en_2649_37453_2512553_1_1_1_37453,00.html> at 14 January 2004.

[93] Organisation for Economic Co-operation and Development, *Nauru is Removed from OECD List of Unco-operative Tax Havens* (2003) <http://www.oecd.org/document/31/0,2340,en_2649_201185_21863583_1_1_1_37453,00.html> at 14 January 2004.

[94] Organisation for Economic Co-operation and Development, above n 91, 14 [27].

[95] Ibid.

[96] OECD Recommendation 1: "Controlled Foreign Corporations (CFCs) - Countries that do not have CFC rules consider adopting them." OECD Recommendation 2: "Foreign investment fund or equivalent rules - Countries that do not have such rules adopt them to entities covered by practices considered to be harmful tax competition."

controls. The OECD countries are also encouraged to adhere to certain defined standards in providing tax rulings and to apply strictly the 1995 OECD Transfer Pricing Guidelines, which provide for internationally agreed-upon standards for establishing prices on intragroup transactions.[97]

Bilaterally, OECD countries have been encouraged to intensify their exchange of information on tax havens and preferential tax regimes.[98] A provision is being considered for the OECD's Model Tax Convention[99] that would deny entities operating under harmful tax regimes access to certain or all of the Convention's benefits. Furthermore, the OECD report asked countries to consider terminating any treaties they might have with tax havens.[100]

After defining the factors to be used in identifying harmful tax practices, the report went on to make 19 wide-ranging recommendations to counteract such practices. The recommendations set out in the report and the accompanying guidelines addressed the problem of harmful tax practices from different angles. Taken together, the recommendations with the guidelines represent a comprehensive approach by member countries for dealing with the problems of harmful tax competition created by tax havens and harmful preferential tax regimes. Some of the recommendations

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[97] OECD Recommendation 6: "Transfer-pricing rules - Countries follow the guidelines set out in the OECD 1995 guidelines on transfer pricing and not promote harmful tax competition." Transfer prices — payments from one part of a multinational enterprise for goods or services provided by another — may diverge from market prices for reasons of marketing or financial policy, or to minimise tax. To ensure that the tax base of a multinational enterprise is divided fairly, it is important that transfers within a group should approximate those which would be negotiated between independent firms.

[98] OECD Recommendation 8: "Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition."

[99] "OECD Model Tax Convention on Income and on Capital", as read on 28 January 2003.

[100] OECD Recommendation 12: "Tax treaties with tax havens - Countries consider terminating their tax conventions with tax havens and consider not entering into tax treaties with such countries in the future."

encourage countries to refrain from adopting harmful tax practices. Others address the issue indirectly by focusing on tax evasion and avoidance, because many forms of harmful tax competition are aimed at taxpayers willing to engage in tax evasion and tax avoidance.

It is the view of the OECD that, the effectiveness of many of the recommendations concerning domestic legislation and tax treaties depends in part upon whether they can be implemented in a coordinated way. Consequently, one of the main recommendations was for the establishment of a forum on harmful tax practices in order to monitor the application of the guidelines and to undertake an ongoing evaluation of existing and proposed regimes.[101] The forum would assess the effectiveness of countermeasures and to propose ways to improve their effectiveness. It would also be responsible for monitoring the implementation of the other recommendations.[102]

The 19 recommendations made were broken into three categories:[103]

- Recommendations concerning domestic legislation: starting from various counteracting measures currently found in domestic laws; these recommendations indicate how to increase their effectiveness;
- Recommendations concerning tax treaties: these recommendations deal with ways of ensuring that the benefits of tax conventions do not unintentionally make policies constituting harmful tax competition more attractive or prevent

[101] OECD Recommendation 15: "Guidelines and a forum on harmful tax practices - Member countries endorse the guidelines set out in the following list dealing with harmful preferential tax regimes."
[102] Spitz, above 89, 239-40.
[103] See Appendix H for a full list of the 19 recommendations.

the application of domestic counteracting measures, as well as ways to ensure that the exchange of information provisions of tax treaties are used in a more effective way; and

- Recommendations for intensification of international cooperation: these recommendations, including the guidelines, put forward new ways through which countries will be able to act collectively against harmful tax competition.

These recommendations may also be distinguished on the basis of the amount of cooperation needed to implement the recommendations. The first set of recommendations can be achieved largely unilaterally, which is to say they can be implemented solely through domestic legislation. The second set of recommendations involves bilateral negotiations to modify tax treaties, while the final set involves or requires multilateral cooperation in order to be effective.[104]

2.3.4 Analysis of the OECD's 19 Recommendations

Recommendation 1 states that countries that do not have CFC or equivalent legislation are to start establishing them and that those countries who do have such legislature, continue to harness them to stem harmful tax practices. This recommendation sets the tone of the OECD's main purpose: to combat harmful tax practices and it should start at a national level where CFC legislation provides for taxation of low-taxed foreign subsidiaries. The CFC rules are intended to tax the income of multinational investors that is most easily transferred. The recommendation encourages countries to extend their CFC regimes to income arising in tax havens or

[104] Steven Sieker, 'Offshore Financial Centers and 'Harmful Tax Competition': The Year 2000 in Review' (2001) 22 *Tax Notes International* 557.

harmful preferential regimes and would coordinate the legislation in terms of their effectiveness in counteracting harmful tax practices.[105]

Recommendation 2 continues the similar path of foreign corporations and investments, stating that taxation rules have to be laid for foreign investments funds. For countries without such rules in place, they should consider establishing them while for the countries which have such legislation in place, should have the rules directed at preventing abuse with harmful tax practices.

Recommendation 3 concerns eliminating double taxation by granting exemptions of tax to foreign entities. Countries which take on this approach in eliminating double taxation should take care that exemptions are not granted to entities which have benefited through tax practices that constitute harmful tax competition.

Recommendation 4 recognises that globalisation has made taxation all the more complicated and encourages rules to be put in place for the reporting of international transactions and foreign operations of resident taxpayers. Countries which have such legislation in place should consider exchanging information to have a more effective and accurate tax system, thus minimising harmful tax competition.

Recommendation 5 continues the notion of exchanging information to reduce harmful tax competition. It recommends that decisions which concern the position of a taxpayer be revealed before planned transactions and releasing the ruling details such as granting, denying or revoking the taxpayer's request to the public.

[105] Joann M Weiner and Hugh J Ault, 'The OECD's Report on Harmful Tax Competition' (1998) 51 *National Tax Journal* 601, 605.

Recommendation 6 deals with transfer pricing. Transfer prices are payments from one part of a multinational enterprise for goods or services provided by another. They may diverge from market prices for reasons of marketing or financial policy, or to minimise tax. To ensure that the tax base of a multinational enterprise is divided fairly, it is important that transfers within a group should approximate those which would be negotiated between independent firms.[106] Countries are encouraged to follow the transfer pricing rules as set out in OECD's 1995 *Guidelines on Transfer Pricing* so that the transfer pricing rules applied by the countries would not fall in line with harmful tax competition.[107]

Recommendation 7 is similar to recommendations 4 and 5 as it too dwells on the importance of information what it concerns tax collection. The benefiting party here is intended to be the tax authorities. By reviewing the legislation to strengthen the countries' tax authorities power to view banking information, this can in some way come into conflict with the private banking sector's principle of client confidentiality. It is up to the individual country to maintain a balance between banking confidentiality and the abuse of the system through harmful tax practices.

Recommendation 8 pushes for co-operation between countries in the exchange of information, particularly for that of tax havens or OFCs. Transactions that take place in OFCs or tax havens and contribute to harmful tax competition should be recorded and made available to the resident countries. With recommendations 4, 5 and 7 in

[106] Pieter J Vogelaar, 'Developments with Regard to the OECD Transfer Pricing Guidelines' (Paper presented at the tenth meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, Geneva, 10-14 September 2001) 1.
[107] Organisation of Economic Co-operation and Development, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (1995 OECD).

place, recommendation 8 is simply to further the same intention but with the co-operation between countries and especially the OFCs.

Recommendation 9 concerns entitlement to treaty benefits. Countries are encouraged to not extend tax treaty benefits to countries whose practices are considered to be in line with harmful tax practices. Countries are also advised to take into consideration the OECD's Model Tax Convention on Income and on Capital which was last updated in January 2003 when forming their tax conventions.[108]

Recommendation 10 concerns the clarification of the status of domestic anti-abuse rules and doctrines in tax treaties. The Commentary on the Model Tax Convention is to be clarified to remove any uncertainty or ambiguity regarding the compatibility of domestic anti-abuse measures with the Model Tax Convention.

Recommendation 11 involves the co-operation and involvement of countries in their list of specific exclusion provisions in their tax treaties. The details, such as certain entities or income are to be provided to the OECD Committee on Fiscal Affairs. As such, they will have a reference to benefit their negotiations in tax conventions and will serve as a basis for discussions in forums. Revealing such information is a huge step forward in the exchange of information to prevent harmful tax practices and give support to the OECD's campaign against harmful tax competition.

[108] Organisation of Economic Co-operation and Development, *Model Tax Convention on Income and on Capital* (2003 OECD).

Recommendation 12 advises countries which have existing tax treaties with tax havens to terminate the treaties. Tax havens only serve to perpetuate harmful tax competition and maintaining tax treaties with them would only aid in the competition.

Recommendation 13 concerns the co-ordinated enforcement regimes such as joint audits and co-ordinated training programmes among countries. With such co-ordinated effort, taxpayers who benefit from practices constituting harmful tax competition can be stopped.

Recommendation 14 calls upon the assistance in the recovery of tax claims. Countries are encouraged to review the current rules applying to the enforcement of tax claims of other countries while the OECD Committee on Fiscal Affairs pursues its work in this area with a view to drafting provisions that could be included in tax conventions for that purpose. This is not easy, as a country which maintains sovereignty over itself does not have any obligation to a second country to help collect the second country's taxes. This runs into conflict with the principle of comity.

Recommendation 15 covers establishing guidelines and a forum on harmful tax practices. OECD member countries should endorse the guidelines on harmful preferential tax regimes set out in 1998 *Harmful Tax Competition: An Emerging Global Issue* report, strengthening their legislative and administrative practices to combat harmful tax practices.[109] If the countries are found to have tax regimes which constitute to harmful tax practices, they have up to December 31, 2005 to remove them. Through forums, member countries should raise their co-operation to an

[109] Organisation for Economic Co-operation and Development, above n 90.

international level by co-ordinating their efforts in treaties and encourage non-member countries to join them in their efforts.

Recommendation 16 extends the intention of the forum between member countries of the OECD to establish a list of tax havens based on the factors identified in the 1998 *Harmful Tax Competition: An Emerging Global Issue* report.[110]

Recommendation 17 concerns the links with tax havens. Countries which have established political or economic links with tax havens are to take care that their links do not give way to harmful tax practices. Also, countries with dependencies that have similar links to tax havens do not allow the links to contribute to harmful tax competition.

Recommendation 18 commissions the OECD Committee of Fiscal Affairs to be responsible for developing and actively promoting a set of principles that should guide tax administrations in the enforcement of the 19 Recommendations. As this Committee is led by the members of the OECD, OFCs which are not members may feel left out as they are not consulted in this seemingly international effort which will no doubt affect them the greatest.

Recommendation 19 takes the OECD 19 Recommendations beyond the OECD members. Motivated by the sole intention and joint efforts at combating harmful tax competition, OECD members recognise that they cannot succeed if they are not supported internationally, thus it is imperative that they encourage non-members to

[110] Ibid.

take on the guidelines through engaging them in various forums. This extends the influence of the Recommendations to that of tax havens and OFCs.

2.3.5 OECD Initiatives Updates

On 18th April 2002, almost two months after its original deadline date of 28th February 2002[111], the OECD released its list of uncooperative countries or territories involved in harmful tax practices.

The following jurisdictions, which had not yet made commitments to transparency and effective exchange of information, were identified by the OECD's Committee on Fiscal Affairs in the List of Unco-operative Tax Havens.[112]

- Andorra
- The Principality of Liechtenstein
- Liberia
- The Principality of Monaco
- The Republic of the Marshall Islands
- The Republic of Nauru
- The Republic of Vanuatu[113]

[111] Organisation for Economic Co-operation and Development, *The OECD Issues The List of Unco-operative Tax Havens* (2002) <http://www.oecd.org/document/19/0,2340,en_2649_33745_2082323_1_1_1_37453,00.html> at 14 January 2004.
[112] Ibid.
[113] Asia Pacific Offshore Institute, www.asiaoffshore.org.

Since the OECD began its initiative against what it perceived as harmful tax practices, where 35 jurisdictions were listed as tax havens,[114] 31 jurisdictions initially made commitments, including the BVI and Samoa.[115]

In *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report*, Vanuatu and the Republic of Nauru have joined the growing number of countries that are committed to transparency and effective exchange of information, resulting in the removal of these two countries in the List of Unco-operative Tax Havens.[116]

2.3.6 Analysis of OECD's Campaign against Harmful Tax Competition

OECD's Concept of Harmful Tax Competition Flawed

One of the major weaknesses of the "Harmful Tax Practices" report can be identified as the vagueness of the concept of 'harmful tax competition' itself. While the report concedes that tax competition can, indeed, be beneficial, 'when tax competition ceases to be beneficial and starts to be harmful is not clear, and is essentially, subjective'.[117] In determining whether a jurisdiction has a low or nominal tax rate, the 1998 OECD Report[118] failed to provide an exact figure or range that would determine the threshold.[119] For example, in the Tax Reform Act of 1986,[120] the US Congress

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[114] Organisation for Economic Co-operation and Development, *Towards Global Tax Co-operation, Progress in Identifying and Eliminating Harmful Tax Practices* (2000 OECD). Also available at appendix U is the full list of the 35 potential tax havens.
[115] Ibid.
[116] Organisation for Economic Co-operation and Development, above n 95, 14.
[117] Mason Gaffney, 'International Tax Competition – A Discussion of the OECD Report and its Implications' (1986) *Private Client Business* 304-5.
[118] Organisation for Economic Co-operation and Development, above n 110.
[119] See Alexander Townsend, Jr, 'The Global Schoolyard Bully: The Organisation for Economic Co-operation and Development's Coercive Efforts to Control Tax Competition' (2001) 25 *Fordham*

reduced the maximum marginal rate on corporate income to thirty-four percent. Compared to other industrialised nations at that time, this rate was low.[121] However, the United States has not found itself a target, even though it likely diverts significant revenue from other nations[122] due to firms seeking the greatest return on their capital.[123]

The OECD acknowledges that countries should be free to design their own tax systems.[124] However, this must be according to internationally accepted standards. The problem is that the "international accepted [tax] norms" with which offshore financial jurisdictions are encouraged to align themselves, are non-existent. The implication is that such norms are, in fact, those which will be determined solely by high tax, onshore countries afraid of tax competition. 'What the report really objects to is that some countries, such as "tax havens", advocate totally free markets in capital and investment and are not willing to impose the distortions as the OECD countries do through their tax systems'.[125] This suggests, perhaps unintentionally, that the only justifiable tax regime is one which supports the welfare state through high taxes in a mixed economy.

The notion of harm is misplaced in another sense. Given that the jurisdiction to tax is recognised as territorial and that onshore countries have no solid claim to investments

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International Law Journal 215, 256. (expressing the need for an example of an appropriate tax rate to guide jurisdictions)

[120] Tax Reform Act 1986 (P.L.) s99-514.

[121] See Karen B Brown, 'Harmful Tax Competition: The OECD View' (1999) 32 *George Washington Journal of International Law and Economics* 311, 316 (book review) (stating that 34% was a comparatively low marginal corporate tax rate)

[122] See Mitchell B Weiss, 'International Tax Competition: An Efficient or Inefficient Phenomenon?' (2001) 16 *Akron Tax Journal* 99, 108 (providing Latin American countries as examples)

[123] Javier G Salinas, 'The OECD tax competition initiative: a critique of its merits in the global marketplace.' 25 *Houston Journal of International Law* 531, 555.

[124] Organisation for Economic Co-operation and Development, above n 118, 15.

[125] Gaffney, above n 117, 308.

outside of their borders, no real harm has taken place: 'Lost opportunities to which one has no right in the first place are not harms suffered in any thing but metaphorical sense'.[126] The OECD's accusation of 'poaching' must be assessed against the backdrop of a global environment which lacks a consensus on the question of the ownership of taxable worldwide income.[127]

A significant flaw in the OECD's argument is the way in which the well-established legal distinction between tax avoidance and tax evasion is diluted with the result that all tax planning efforts are treated as unethical and unlawful. The capacity of offshore financial centres to allow persons to 'escape' tax is condemned in totality, implying that such centres may not legitimately facilitate any kind of tax mitigation or planning within their borders. This means, further, that disclosure can then be justified as a tool to thwart such tax planning.[128]

The erroneousness of the OECD's argument is highlighted even more by the fact that several onshore financial centres offer similar tax functions to non-residents. Yet, these are not treated as engaging in 'harmful tax competition'.

The US facilitates non-resident investment by reducing tax in exactly the same way as other 'harmful tax practices'. For example, by putting shipping operations in the United States, a combination of credits and allowances which are granted, produces zero tax. The United States (Delaware) has beaten Panama and Liberia at their own

[126] Ibid 309.
[127] Antoine, above n 44, 314-5.
[128] Ibid.

game, because if there is one thing better than paying no tax, it is paying negative tax. The government actually pays tax credits.[129]

Similarly, the OECD report pays scant respect or regard for the well-established rule of international law which states that one state does not enforce the tax laws of another. This rule recognises the territorial application of tax law.[130] The OECD simply asserts the inaccurate presumption that it is unfair or harmful for offshore countries to continue enforcing this rule.[131] This is despite the fact that the rule continues and, presumably, will continue to be applied by onshore nations outside the offshore financial concept.

The OECD report goes one step further. It accuses offshore financial centres of 'ring fencing' and discriminatory practices.[132] This speaks to a legal system where the positive benefits of the fiscal policy are reserved only for non-residents. This is a simplistic and inaccurate assumption made about offshore financial jurisdictions as a whole. Several offshore financial centres, such as Hong Kong and Singapore, in fact, do not make distinctions between residents and locals in their tax policies. This is also the case in The Bahamas and the Cayman Islands, for example, where there are no direct taxes but rather, consumption taxes, which apply to all. Further, even if such a claim for other offshore nations is accepted, this places them in the same category as several other onshore jurisdictions which exempt non-residents from paying taxes on

[129] Spitz, above n 102, 6.
[130] Gilbert N M O Morris, 'The Loss of Sovereignty, the United Nations, and Offshore Financial Centres' (2001) 10 *Tax Notes International* 1297.
[131] Terry Dwyer, 'The New Fiscal Imperialism' (2002) 18(4) *Policy* 12.
[132] Organisation for Economic Co-operation and Development, above n 124, 26.

such items as their bank deposits. Indeed, the very criteria used by the OECD in identifying 'harmful' tax havens are challenged by offshore countries.[133]

Competing Philosophies

The first five years of the initiatives against offshore financial centres can be viewed as driven by a different philosophical approach on how to deal with the major flaw in the system of direct taxation - that capital is mobile. But there is another problem relating to this form of taxation, which is that of a new political correctness which states that tax competition be viewed as essentially unjust competition.

Whichever way it is interpreted, a direct system of income tax in large part must rely on voluntary compliance by its citizens for it to work.[134] This in part explains the effort expended by onshore treasuries on negative publicity about the offshore world. However, it remains a fact that, historically speaking, some jurisdictions such as the US, the UK and Canada have had relatively high taxpayer compliance,[135] while tax evasion has been endemic in many European and Latin American countries.[136] It is because tax evasion has been so pervasive in Europe[137] that automatic reporting appeals so much to the EU governments, but not, unsurprisingly, to Switzerland,

[133] Antoine, above n 128, 314-9.
[134] John Hasseldine, 'Increasing Voluntary Compliance: The Case of Tax Amnesties' (1989) 6(4) *Australian Tax Forum* 509.
[135] Cedric Sandford, 'International Comparison of Administrative and Compliance Costs of Taxation' (1994) 11 *Australian Tax Forum* 291.
[136] Vito Tanzi, *Taxation in an Integrating World* (1995).
[137] Bruce Bartlett, *Europe's Underground Economies* (1998) National Centre for Policy Analysis <http://www.ncpa.org/ba/ba278.html> at 10 July 2004.

Austria, Belgium, Luxembourg and now Guernsey, which are favoured jurisdictions for discrete banking.[138]

While traditionally the UK has favoured the liberty and privacy of the individual and championed the rule of law, the Government's current position[139] in support of automatic exchange of information can be understood only as driven by the need to keep a mandatory withholding tax from driving the Eurobond market out of the City of London and the desire to maintain competition among the various income rates internally within the EU. Its perceived high-handed and inappropriate attitude towards its overseas territories can only be understood in this context.[140]

Uneven Hand

As discussed above, having produced its report entitled, *Harmful Tax Competition: An Emerging Global Issue* in 1998,[141] the OECD then initiated, in a unilateral and arbitrary manner, the identification of jurisdictions that it considered to be competing in tax matters in a way that was harmful to its member-states. In 1998 the OECD indicated that there were 47 jurisdictions it deemed to be tax havens. Later that year six of these jurisdictions were dropped but the OECD never disclosed their identity. It can only be surmised that the OECD decided to exclude these six undisclosed jurisdictions for political reasons such as the reluctance of its member-states to engage in a confrontation with the Governments concerned. It is noteworthy, for instance, that

[138] *Council Directive (EC) No 2003/48/EC of 3 June 2003 Taxation of Savings Income in the Form of Interest Payments* [2003] OJ L 157, 38.
[139] Inland Revenue (United Kingdom), *Countering Cross-Border Tax Evasion by Individuals* <http://www.inlandrevenue.gov.uk/esd/> at 10 July 2004.
[140] Anthony Travers, *Global concern* (2003) The Lawyer Group <http://www.thelawyer.com/cgi-bin/item.cgi?id=99607&d=11&h=24&f=23> at 14 October 2003.
[141] Organisation for Economic Co-operation and Development, above n 132.

Hong Kong was never named as a tax haven, yet, by every criteria that the OECD established, Hong Kong should have been a prime target. Was Hong Kong's omission an indication that the OECD did not want to offend the Peoples Republic of China?[142]

When the OECD produced a report in 2000 entitled, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*,[143] it was revealed that the Organisation was treating its member states quite differently from the unilateralist and arbitrary stance taken with the targeted jurisdictions. First, while the targeted jurisdictions were quite categorically named as "tax havens", some OECD members, such as Switzerland, Belgium, Portugal, Luxembourg, Canada and the United States, were described only as having regimes that were "potentially harmful". Second, the OECD carried out a unilateral evaluation of the jurisdictions they subsequently labelled as 'tax havens', but its own members each performed 'a self-review" to determine whether or not they had preferential tax regimes.

One observation offered by one such labelled "tax haven", Antigua and Barbuda,[144] is that the OECD countries are the principal advocates of the virtues and merits of competition in the provision of goods and services globally. For them "competition" is the new panacea for the world's economic ills, because their industrial and agricultural capacity has reached the point where it needs unrestricted entry to global markets to continue to provide employment and profits to their people. Yet, while they (G8) promote competition in everything else, they seemed to decry it in taxation.

[142] This was an observation made by Sir Ronald Sanders, High Commissioner to the United Kingdom for Antigua and Barbuda. Amanda Banks, *Sanders Renews Attack on OECD* (2003) Tax-News.com <http://www.tax-news.com/asp/story/story.asp?storyname=10447> at 10 July 2004.
[143] Organisation for Economic Co-operation and Development, above n 115.
[144] Ronald Michael Sanders, 'The OECD's 'Harmful Tax Competition' Scheme: The Implications For Antigua And Barbuda' (Speech delivered at the luncheon meeting of the Antigua and Barbuda Chamber of Commerce and Industry, Antigua and Barbuda, 27 March 2001).

Their objection appears to be derived from the fact that, in a globalised world, the mobility of financial and other services, such as shipping and internet gambling, provide an opportunity for small states, and pose a threat to them. The low tax or no tax regimes of these small states coupled with literacy in English and good telecommunications gives them an advantage with which many OECD countries cannot compete. Instead of trying to vie with small states by lowering their own taxes, the OECD responded by demanding that these small jurisdictions change their tax systems and structures or face damaging sanctions.

In an OECD paper entitled: *Globalisation: Impact on Tax Policy and Administration,* [145] the OECD revealed its thinking behind the 'harmful tax competition' scheme. It says:

> In this new global environment multinational enterprises will continue to move their manufacturing activities to low-cost countries... All countries will be forced to compete for this footloose investment: either by lowering regulatory standards or creating incentives, particularly tax incentives, to attract business to their jurisdictions.[146]

Sanders suggests a fear in the OECD countries that they will lose investment in a range of activities to developing countries that offer tax incentives to win investors.[147] The OECD's concern is that its member states will lose investors who would

[145] Presented to a Ministerial Conference hosted by the Government of Barbados in association with the Commonwealth Secretariat and the Global Forum on International Taxation of the OECD, 8-9 January 2001.
[146] Ibid.
[147] Ibid.

otherwise be subject to their high taxation. Their purpose is to tax the profits and interest income of those investors wherever they may be. The consequence would be to deprive small developing countries from advancing their economic development through their tax structures and systems.

Of course, the OECD argument represents the views of its member states which have reached a high level of industrial development precisely because of tax competition in which they lured foreign investment into their countries by tax breaks. In fact, many of them continue to do so.[148]

In the United States, for instance, institutions, both banks and non-banks, held more than $1.8 trillion in deposits from foreign persons at the end of 2000.[149] That money is there because the US exempted the holders of those accounts from taxes on their interest income. The US banking system, particularly in Florida and New York, could face collapse if these trillions of dollars were to be withdrawn and taken elsewhere – a fact well known to the Governor of the State of Florida, J E Bush, who lobbied strongly against US exchange of information with tax authorities of other governments, including those from the OECD. In June 2001, Governor Bush sent a letter to US Treasury Secretary Paul O'Neill arguing that regulation, contemplated by the Inland Revenue Service, to allow information to be passed to other countries about interest payments made to their nationals "would place US banks at a competitive

[148] Ibid.

[149] Bureau of Economic Analysis (BEA), U.S. Department of Commerce, 'The Net International Investment Position of the United States at Yearend 2000' Harlan W. King (ed.), in *Survey of Current Business*, July 2001.

disadvantage relative to banks in the Caribbean and Europe... and would seriously hamper the ability of US banks to continue to attract foreign depositors."[150]

The United Kingdom also operates similar regimes designed to attract funds to its banks and bond markets from overseas. It is therefore very significant that in its 1998 report, the OECD declared that, "the tax treatment of interest on cross-border savings instruments, particularly bank deposits, is not considered in this first stage of the project".[151]

Modification of OECD Stance

Hence, it was the new Republican administration of George W Bush, which came to office in January 2001, that caused the OECD to review its initiative which had been strongly supported by the previous Democratic Party government of Bill Clinton and particularly by his Treasury Secretary, Lawrence Summers. Much of the success with the Bush government was due to the collaboration of some Caribbean governments with the Center for Freedom and Prosperity (CFP) in Washington. The CFP was established by a group opposed to tax harmonisation and information exchange on the

[150] Cited in Mike Godfrey, *US Treasury to Review Proposed Information Exchange Rules* (2001) Tax-News.com <http://www.tax-news.com> at 3 November 2003.

[151] In Harry Huizinga and Gaetan Nicodeme's "Are International Deposits Tax-Driven?", European Commission Economic Paper No 152, by using data on the cross-border ownership of deposits and on the tax rates and information-sharing regimes (domestic and international) in effect in different countries, Harry and Gaetan find that some mechanisms are more influential than others in driving deposits offshore. In particular, high income and wealth taxes and domestic reporting of interest to the tax authorities (15 OECD countries require their banks to generally report 'interest paid and to whom it is paid') are strong influences. A point estimate is that a tax that lowers the net interest return by 100 basis points causes deposit placements abroad to increase by 146 per cent. In contrast, there is less evidence that interest withholding taxes discourage such depositing, likely because the rates of withholding tax are typically rather low.

basis of the damage that would be done to the US economy.[152] The CFP informed members of the US Congress and Senate and the new US Government of the serious flaws in the OECD initiative. As a consequence, the new US Secretary of the Treasury, Paul O'Neill, caused the OECD to amend its initiative.[153] While there were other countries, such as Canada, that earlier saw the wisdom of such change, they lacked the strength to resist the domination of the OECD by the 15 EU countries who had been the driving force behind this scheme. In the event, the OECD modified its initiative in November 2001, but only to refocus it on what O'Neill called its "core element", ie, "the need for (OECD) countries to be able to obtain specific information from other countries upon request in order to prevent non-compliance with their tax laws".[154]

Thus the OECD initiative switched its focus to "transparency" and "effective exchange of information".[155]

OECD's Authority

A fundamental difficulty still remained. It was one that had far reaching implications and was by no means limited to this particular initiative of the OECD. Should the offshore jurisdictions around the world accept that the OECD has the right or authority to set itself up to make tax rulings which they expect non-members to follow? By doing this, would these jurisdictions, targeted by the OECD as 'tax havens', not be

[152] Center for Freedom and Prosperity <http://www.freedomandprosperity.org/Glance/glance.shtml> at 10 July 2004.
[153] Paul H O'Neill, 'OECD Harmful Tax Practices Initiative' (Statement delivered before the Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations, July 18th, 2001).
[154] Sanders, above n 144.
[155] Ibid.

opening the floodgates to a raft of other demands by an organisation with no international authority except the coercive power of its member states? The OECD is a multinational grouping of thirty countries. It is not an international organisation and it has no legal authority to speak for the world or to establish rules, norms or standards for any state except its own members. Nonetheless, it is now dictating terms on what, in short, could be described as cross-border tax matters.

The jurisdictions have now had to take serious account of it in reaching a decision about whether or not to make a commitment to the OECD on the two remaining aspects of "transparency" and "effective exchange of information". By the same token, they also had to consider carefully the consequences to their economies of the application of sanctions by those members of the OECD who are important partners to them in trade and financial services. The key players in this regard would have been the US, Canada and the UK.

The OECD report *Harmful Tax Competition: An Emerging Global Issue* itself acknowledges that there is no compelling reason why any two countries should have the same tax policies and structure. It views this as a political decision.[156] Mitchell, an opponent of the OECD, has accused the 'unelected paper-pushers' and bureaucrats at the OECD of seeking to set up a 'tax cartel' that would set tax policy for the world. His view is that this campaign is a backdoor manoeuvre aimed at 'undermining national sovereignty' of countries by placing the setting of a global tax policy in a few hands.[157]

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[156] Organisation for Economic Co-operation and Development, above n 141, 15[26].
[157] Dan Mitchell, 'Harmful Tax Competition: An Emerging Global Issue', (Research paper, Centre for Freedom and Prosperity, 1998) and Dan Mitchell, 'An OECD Proposal to Eliminate Tax Competition

September 11, 2001

Prior to September 11, 2001, Treasury Secretary Paul O'Neill and his staff opposed certain aspects of the OECD harmful tax competition initiative and were lukewarm on the rest of it. However this attitude changed in the wake of the atrocities. Evidence of the changed mood in the US was an executive order by President George W Bush on 24th September 2001[158] requiring jurisdictions to establish a new counter-terrorism economic sanction and export control regime under the threat of more economic penalties. Further, the US introduced The USA Patriot Act[159] imposing a series of extra-territorial measures targeting offshore financial institutions in the belief that they could be used to fund terrorist organisations. The belief that the terrorists and particularly the al-Qaeda organisation of Osama Bin Laden had used offshore financial centres to move money to finance their activities caused the US Treasury to temper its criticism of the OECD initiative. In the first place, the US needed the other OECD member-states to help forge its coalition against terrorism, and in the second it was easy to believe that financial institutions in small jurisdictions might have unwittingly provided facilities for terrorist organisations through legitimate companies. As it turns out, most of the terrorist bank accounts were actually in OECD countries including the US and the UK.[160]

Offshore Financial Services by OECD Members

Would Mean Higher Taxes and Less Privacy', (Research paper, Economic Policy Studies, Washington DC: The Heritage Foundation, 2000).

[158] George W Bush, *Executive Order on Terrorist Financing* (2001) The White House <http://www.whitehouse.gov/news/releases/2001/09/20010924-1.html> at 14 May 2004.

[159] "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001".

[160] Sanders, above n 155.

Sanders offered some interesting findings worth noting:[161] 80% of the total offshore financial services industry is located in the OECD countries. The remaining 20% is in the non-OECD countries, with even this segment dominated by a few large centres such as Hong Kong and Singapore which, the OECD had not named as 'tax havens'. This means that approximately less than 10% of offshore business in the world is done in the targeted jurisdictions.

Account should also be taken of the fact that searches of banks throughout the world for money used to finance terrorism in the wake of the atrocities of 11th September 2001 in New York and Washington, revealed that most of the hundreds of millions of dollars of the al-Qaeda organisation and other terrorist groups was found in the banks of OECD countries.[162] Only US$20 million was discovered in The Bahamas after a search by that country's authorities, and even then it was in a branch of a bank headquartered in an OECD country. Despite these findings, the pressure for OFCs to adhere to the "transparency" and "effective exchange of information" requirements is only increasing. As fittingly put by the Minister of Finance of the Bahamas, Sir William Allen:[163]

> The events of September 11 and their consequences are very unlikely to leave financial services unaffected. Already, there are indications of a likely adjustment in the trade off between individual privacy and collective security. The balance is a delicate one.

[161] Ibid.
[162] Ibid.
[163] Sir William Allen, Minister of Bahamas, News Detail, Bahamas Financial Services Board, 2 October 2001.

2.4 The FATF 40 Recommendations

2.4.1 The Focus of the FATF Report

In response to the mounting concerns over money laundering, the FATF was established by the G-8 Summit that was held in Paris in 1989. Recognising the threat posed to the banking system and to financial institutions, the G-8 Heads of State or Government and President of the European Commission convened the Task Force from the G-8 member States, the European Commission, and eight other countries.[164]

The FATF is an inter-governmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. It is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

In 1990, the FATF issued 40 recommendations[165] intended to fight the phenomenon of money laundering. Based on those recommendations, the members of the FATF underwent a process of internal monitoring designed to bring their internal legislation and procedures into line with the recommendations on money laundering. The report on non-cooperative countries or territories released in 2000[166] was a logical extension

[164] Financial Action Task Force, *More about the FATF and its Work* <http://www.fatf-gafi.org/AboutFATF_en.htm> at 10 July 2004.

[165] Financial Action Task Force, above n 67. For a full list of the 40 Recommendations, see Appendix G.

[166] Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2000 FATF).

of this process, turning as it did from internal housecleaning measures to the examination of offshore jurisdictions.

The reason for this change of focus can be summarised by the following excerpt from the introduction to the report:[167]

> Existing anti-money-laundering laws are undermined by the lack of regulation and, essentially, by the numerous obstacles on customer identification, in certain countries and territories, notably offshore financial centres.
>
> Recent years have witnessed a sharp increase in the number of jurisdictions offering financial services without appropriate control or regulation and protected by strict banking secrecy.
>
> To ensure the stability of the international financial system and effective preventions of money laundering, it is desirable that all financial centres in the world should have comprehensive control, regulation, and supervision systems. It is also important that all financial intermediaries or agents be subject to strict obligations, notably as regards the prevention, detection, and punishment of money laundering.

Firstly, the report[168] identified what the FATF considered to be the detrimental rules and practices that obstruct international cooperation against money

[167] Ibid.
[168] Ibid.

laundering. Secondly, it outlined the steps that would be taken by the FATF to "encourage constructive anti-money-laundering action."

The 11 criteria[169] identifying detrimental rules and practices that "enable criminals and money launderers to escape the effect of anti-money-laundering measures" are broken down into four categories:

- loopholes in financial regulations;
- obstacles raised by other regulatory requirements;
- obstacles to international cooperation; and
- inadequate resources for preventing and detecting money laundering activities.[170]

2.4.2 Analysis of the FATF 40 Recommendations

The first set of criteria concerns regulatory loopholes. Within this category, the FATF identified five sub-classes of detrimental rules and practices, which are summarised as follows.[171] The first sub-class concerns regulatory and supervisory practices that fall seriously short of recognised international standards regardless of whether these practices relate to the regulation and supervision of financial institutions that operate either onshore or offshore. These criteria follow from Recommendation 26[172], which

[169] Ibid 14.
[170] Hinterseer, above n 11, 236-38.
[171] Financial Action Task Force, above n 165.
[172] FATF Recommendation 26: "The competent authorities supervising banks or other financial institutions or intermediaries, or other competent authorities, should ensure that the supervised institutions have adequate programs to guard against money laundering. These authorities should co-operate and lend expertise spontaneously or on request with other domestic judicial or law enforcement authorities in money laundering investigations and prosecutions."

states that financial institutions should have in place adequate programmes to guard against money laundering.

The second sub-class relates to procedures for the incorporation and licensing of financial institutions. These criteria are based on Recommendation 29[173], which states that the appropriate domestic authorities should implement and enforce effective legal and regulatory measures to protect financial institutions registered and operating in these jurisdictions from infiltration by criminal organisations. The type of procedures regarded as inadequate by the FATF include a lack of rules that obligate financial institutions to investigate the background of the corporate officers and to verify the true identity of the beneficial owners of the corporate counter-parties with whom they do business, rudimentary requirements within countries concerning the registration and licensing of financial institutions that seek to operate in their jurisdictions, and the absence of measures within countries to guard against a significant investment being made in or control or management functions being obtained over the financial institutions operating in their jurisdictions by criminal organisations.

The third sub-class involves inadequate customer identification requirements concerning the opening and operation of accounts. These criteria follow from Recommendations 10, 11 and 12.[174] In particular, these recommendations respectively concern the need for financial institutions not to maintain anonymous accounts or accounts in obviously fictitious names, the requirement to verify a client's and beneficiary's identity, and the need to maintain relevant records for a reasonable time

[173] FATF Recommendation 29: "The competent authorities regulating or supervising financial institutions should take the necessary legal or regulatory measures to guard against control or acquisition of a significant participation in financial institutions by criminals or their confederates."
[174] Financial Action Task Force, above n 171, 6-7.

period. In the context of Recommendations 10, 11 and 12, the FATF notes that the associated obstacles are of two types. The first concerns a lack of any legal obligation to verify a counter-party's identity. In particular, lack of effective legal requirements to verify both a client's and beneficiary's identity at the time a commercial relationship is initiated and no obligation to re-verify this information when questionable activities arise. Also included are no requirements for financial institutions to develop and maintain a money laundering training programme for employees. The second pertains to procedural obstacles. In particular, no obligation to maintain records for a reasonable period of time (five years) and the existence of legal, administrative, or other obstacles that hinder the exchange of information with other domestic as well as foreign regulatory and law enforcement agencies. By their nature, these procedural obstacles tend to hinder the exchange of information concerning a client's and beneficiary's identity and the financial activities conducted through the accounts they operate.

The fourth sub-class concerns excessive legal provisions embedded in domestic laws as well as administrative and other requirements that shelter questionable activities from regulatory oversight. These criteria follow from Recommendations 2 and 37.[175] Recommendation 2 is one of the Forty Recommendation's general framework recommendations and it states that domestic secrecy laws should not be structured in such a manner so as to inhibit the implementation of the recommendations. Meanwhile, Recommendation 37 states that countries should have in place measures

[175] FATF Recommendation 2: "Financial institution secrecy laws should be conceived so as not to inhibit implementation of these recommendations." FATF Recommendation 37: "There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions."

to provide assistance when requested to do so by other countries. These mutual assistance measures include compulsory measures in respect of requirements to produce records, conduct searches, and seize evidence for use in investigations. Although the FATF accepts that the use of secrecy and confidentiality services maybe valid in certain circumstances, the FATF's concerns relate to excessive secrecy measures that pre-empt both the supervision of financial institutions and the investigation of suspicious activities. In particular, measures that hinder investigations by domestic and foreign regulatory and law enforcement agencies especially measures that effectively block money laundering investigations and prosecutions because they can not be waived, revoked or modified by the relevant authorities in appropriate circumstances.

Finally, the fifth sub-class relates to the lack of a suspicious transactions reporting regime or the existence of such a regime whose operation is ineffective. At the core of the Forty Recommendations is the principle that financial institutions should report all of the suspicious activities they identify to the relevant authorities. Obviously, the control of money laundering will be hampered where no such authority has been designated to receive such reports. An equally significant problem, however, concerns situations where a jurisdiction designated such as authority, but the operation of that authority is ineffective. In particular, where the designated authority is staffed in a deficient manner, lacks sufficient resources, is unable to disseminate material information as appropriate, or has ineffective powers to conduct investigations, the effect is the same as if no such authority had been designated.

The second set of criteria concerns obstacles that are embedded in a country's laws that hinder the investigation and prosecution of money laundering. This set of criteria follows from Recommendation 15, 16 and 17.[176] Recommendation 15 states that financial institutions should be required to promptly report suspicious activities. Recommendation 16 recommends the exemption of financial institutions from civil and criminal liability where such a report is made in good faith, even if the financial institution has no knowledge as to what constitutes the underlying crime, and regardless of whether any illegal activity has actually occurred. Meanwhile, Recommendation 17 concerns measures that a country should put in place to prevent financial institutions from passing on to clients, details of the information that has been reported about the client's activities.

At the same time, the FATF recognises that it is insufficient, ineffective, and a waste of resources to develop and implement a suspicious reporting regime if the mechanisms of that regime do not operate in an effective manner. Here, the FATF's concerns focus on other domestic legal, regulatory, and administrative requirements that effectively neutralise the measures detailed under Recommendations 15, 16 and 17 and they include the following.[177] First are inadequate legal requirements within countries related to the registration of companies, trusts, charitable foundations, and other organisations with legal personality. In particular, inadequate measures within

[176] FATF Recommendation 15: "If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities." FATF Recommendation 16: "Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred." FATF Recommendation 17: "Financial institutions, their directors, officers and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities."

[177] Financial Action Task Force, above n 174.

countries to identify, record, and make available information concerning the name, legal form, address, directors, and articles of association of legal entities registered in their jurisdictions. Second are lack of requirements within countries to identify, verify and maintain current information on the beneficial owners of legal entities. An example of such an obstacle would be a situation where intermediaries are allowed to intercede in a transaction with the effect that the identity of the transaction's beneficiary is hidden. This second set of criteria is to be read expansively as it is based on Recommendations 19 and 25.[178] These recommendations focus on additional money laundering control measures that may be required with respect to professions other than the banking profession and are measures that relate to the regulation and monitoring of the activities of shell companies. Consequently, the FATF has flagged this second set of criteria as practices that are especially detrimental and are therefore of particular concern.

The third set of criteria concerns obstacles that hinder international co-operation in investigating and prosecuting money laundering. Given the transnational nature of organised crime, the control of money laundering requires more than the mere collection of information. Information must be shared as appropriate with other relevant domestic and foreign organisations in order to help build and bring comprehensive cases. Here, the obstacles of concern pertain to those that exist at the administrative and judicial level, while the associated criteria follow from

[178] FATF Recommendation 19: "Financial institutions should develop programs against money laundering. These programs should include, as a minimum: (i) the development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees; (ii) an ongoing employee training programme; (iii) an audit function to test the system." FATF Recommendation 25: "Countries should take notice of the potential for abuse of shell corporations by money launderers and should consider whether additional measures are required to prevent unlawful use of such entities."

Recommendation 32 [179]. This recommendation states that regulatory and law enforcement agencies should be in a position to promptly exchange information as and when necessary and without undue restrictions.

The particular criteria identified by FATF to be of concern include the following. First are obstacles that hinder co-operation among administrative authorities. These obstacles include legal or administrative requirements that either prohibit or unduly restrict the exchange of information with both relevant foreign and domestic agencies especially the financial intelligence units of other countries. These obstacles also include laws or regulations that prohibit domestic authorities from pursuing enquiries or investigations on behalf of foreign agencies. In effect, they include any obstruction that manifests an obvious unwillingness to respond constructively to enquiries and to support investigations. Second are obstacles that hinder international co-operation among judicial authorities. The identification of these obstacles follows from Recommendations 4, 36 and 40.[180] Recommendation 4 concerns the requirement to make money laundering a criminal offence, while the latter two recommendations

[179] FATF Recommendation 32: "Each country should make efforts to improve a spontaneous or "upon request" international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection."

[180] FATF Recommendation 4: "Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences." FATF Recommendation 36: "Co-operative investigations among countries' appropriate competent authorities should be encouraged. One valid and effective investigative technique in this respect is controlled delivery related to assets known or suspected to be the proceeds of crime. Countries are encouraged to support this technique, where possible." FATF Recommendation 40: "Countries should have procedures in place to extradite, where possible, individuals charged with a money laundering offence or related offences. With respect to its national legal system, each country should recognise money laundering as an extraditable offence. Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgements, extraditing their nationals, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings."

relate to the exchange of information. An obvious red flag that identifies non co-operative countries and territories is the absence of laws that make the laundering of the proceeds of crime a criminal offence. In general, related obstacles include any legal, regulatory, administrative or other requirements that manifests an obvious unwillingness to respond to requests for assistance made under a mutual legal assistance treaty. Particularly where the request relates to matters recognised to be offences under the law of both countries or to issues involving tax and other fiscal offences.

The fourth set of criteria concern the inadequate allocation of resources by governments to their regulatory and law enforcement agencies to enable these agencies to identity, investigate, and prosecute money laundering. The control of money laundering requires an integrated approach in that it requires the public and private sector to work together. In ascertaining whether at least the framework to allow for such an approach is in place on the public sector side, two sets of criteria are especially relevant. First are insufficient operational resources such that administrative and judicial authorities lack the necessary financial, technical, and human resources to do their jobs.[181] Second is the absence of a financial intelligence unit or equivalent body that is charged with collecting, analysing, and disseminating information to other administrative, judicial and law enforcement bodies. While financial institutions have primary responsibility for identifying and reporting money laundering activity, the state retains responsibility for analysing this information, conducting investigations, and of course bringing prosecutions. As a matter of principle, to justify the bureaucratic and financial burden imposed on financial

[181] In this respect, a complimentary issue of importance that has been identified by the FATF concerns that of corruption, which must be addressed if efforts to control money laundering are to succeed.

institutions to identity suspicious activities, governments should ensure that they have in place effective mechanisms to analyse and use the information they require to be collected. Otherwise, the private sector is forced to bear an unnecessary burden that unduly ties up financial resources.[182]

In October 2001, 8 more Recommendations from the FATF were added, incorporating the global fight against terrorism into its combat against money laundering.[183]

2.4.3 FATF Initiatives Updates

In June 2000, the FATF released a second report.[184] This report represented the implementation of the first recommendation of the earlier report, namely the establishment of a list identifying non-cooperative countries or jurisdictions in the area of money-laundering.

The FATF identified 29 countries for review.[185] These countries were reviewed by four regional review groups which analysed the anti-money-laundering regimes in those jurisdictions. As provided for in the initial report, the reviewed jurisdictions were involved in face-to-face meetings and were invited to make comments on their respective draft reports. Of the 29 countries that were studied, 15 were ultimately considered to be non-cooperative. The report contains a summary of the conclusions reached with respect to each country under consideration.

[182] Hinterseer, above n 170, 238-41.
[183] See Appendix G.
[184] Financial Action Task Force, above n 169.
[185] See Appendix F.

On October 5, 2000, the FATF issued a press release stating that of the jurisdictions identified, 15 had either changed their legislation or had made a commitment to change their legislation in response to the June 2000 report.[186] Of the jurisdictions identified, only Lebanon, Niue, and Nauru had not made some type of legislative change or political commitment to change or implement money laundering legislation. Notwithstanding this commitment, the FATF declined to remove any jurisdiction from the list of non-cooperative countries or territories at that time. In addition, it stated that it would later review more jurisdictions for possible inclusion in the list.[187]

On 21st June 2002, the FATF released its annual report that included the list of Non-Cooperative Countries and Territories (NCCTs).[188]

> "The FATF issued its thirteenth annual report on 21st June, which outlines the main achievements of the FATF in 2001-2002 under the presidency of Hong Kong, China, including the significant progress that has been made in combating terrorist financing and in the work on non-cooperative countries and territories (NCCTs). Four regional groups (Americas; Asia/Pacific; Europe; and Africa and the Middle East) meet regularly to prepare the NCCTs discussions in the plenary.
>
> To decide whether a jurisdiction should be removed from the list, the FATF must first be satisfied that the jurisdiction has addressed the deficiencies previously identified by enacting significant legislation and regulations. The

[186] Financial Action Task Force, above n 184.
[187] Sieker, above n 104.
[188] Financial Action Task Force, *Annual Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2002).

FATF removed Hungary, Israel, Lebanon; and St. Kitts and Nevis from the list of non-cooperative countries and territories (NCCTs) in the fight against money laundering."

"The list of NCCTs is as follows: Cook Islands; Dominica; Egypt; Grenada; Guatemala; Indonesia; Marshall Islands; Myanmar; Nauru; Nigeria; Niue; Philippines; Russia; St. Vincent and the Grenadines; and Ukraine. For those jurisdictions which were identified as non-cooperative in 2000 and in 2001 and which had not made adequate progress, the FATF has a policy to recommend further countermeasures in a gradual, proportionate and flexible manner. Accordingly, the FATF calls on its members to update their advisories requesting that their financial institutions give special attention to businesses and transactions with persons, including companies and financial institutions, in listed countries or territories to take into account the changes in the list.

The FATF welcomed further progress made by a number of the 15 jurisdictions on the list. On the basis of the progress made, Grenada, Niue, Russia and St. Vincent and the Grenadines will be invited to submit implementation plans to enable the FATF to evaluate the actual implementation of their legislative changes. At its next plenary meeting on 9-11 October 2002, the FATF reviewed again the situation of each NCCT."

In 2003, the same report had several updates, including a fall from 15 to 9 NCCTs.[189] The FATF recognised that St. Vincent and the Grenadines, listed as non-cooperative in the fight against money laundering in June 2000, had sufficiently addressed the deficiencies identified by the FATF through enactment and implementation of appropriate legal reforms. In October 2002, the Plenary recognised that Russia, Dominica, Niue and Marshall Islands, identified as NCCTs in June 2000, had addressed the identified deficiencies and therefore removed them from the NCCTs list.[190] And in February 2003, the Plenary removed Grenada from the list of NCCTs after enactment and implementation of legal reforms addressing identified deficiencies. Consequently, the procedures prescribed in FATF Recommendation 21 were withdrawn.[191] To ensure continued effective implementation of these reforms, the FATF will monitor the developments in St. Vincent & the Grenadines, as well as Dominica, Niue, the Marshall Islands, and Grenada, in consultation with the relevant FATF-style regional body and particularly in the areas laid out in this NCCT report.[192]

Although removed from the NCCTs list in June 2001, the Bahamas has been subjected to FATF monitoring since that time. The FATF encouraged the Bahamas to improve mechanisms for international co-operation so that the FATF may end formal monitoring.[193]

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[189] Financial Action Task Force, *Annual Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2003).
[190] For a deeper insight into the fulfilled regulations which will grant a country or territory removal from the NCCTs list, please see Appendix J.
[191] Financial Action Task Force, *NCCT Initiative* (2004) <http://www1.oecd.org/fatf/NCCT_en.htm> at 10 June 2004.
[192] Financial Action Task Force, above n 189.
[193] Ibid.

The FATF welcomed the progress made by the Cook Islands, Egypt, Guatemala, Nigeria, the Philippines, Ukraine and Nauru in addressing deficiencies and calls upon them to continue this work.[194] Until the deficiencies have been fully addressed and the necessary reforms have been sufficiently implemented, it believes that scrutiny of transactions with these jurisdictions, as well as those with Indonesia and Myanmar, continues to be necessary and reaffirms its advice of June 2000 to apply, in accordance with Recommendation 21, special attention to such transactions. The FATF notes with particular satisfaction that Egypt, Guatemala, and the Philippines have enacted most, if not all legislation needed to remedy the deficiencies previously identified. On the basis of this progress, the FATF will invite those countries to submit implementation plans to enable the FATF to evaluate actual implementation of the legislative changes in each jurisdiction according to the principles agreed upon by its Plenary.

With respect to jurisdictions de-listed in June 2002 and subject to the monitoring process from June 2002 to June 2003, future monitoring for St Kitts & Nevis will be conducted within the context of the Caribbean Financial Action Task Force's (CFATF) relevant monitoring mechanisms. Future monitoring of Hungary will be conducted within the Council of Europe's MONEYVAL [195] and its relevant monitoring mechanisms.

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[194] Ibid 1.

[195] In 2002, the PC-R-EV formally changed its name to MONEYVAL. MONEYVAL was established in September 1997 by the Committee of Ministers of the Council of Europe to conduct self and mutual assessment exercises of the anti-money laundering measures in place in 25 Council of Europe countries, which are not members of the Financial Action Task Force (FATF). The effort includes encouraging jurisdictions to improve their anti-money laundering measures in keeping with the FATF Forty Recommendations and to enhance international co-operation. MONEYVAL also engages in a regular typologies exercise focused on the methods and trends of money laundering activity.

At June 2003, the list of NCCTs comprised the following jurisdictions: Cook Islands, Egypt, Guatemala, Indonesia, Myanmar, Nauru, Nigeria, Philippines and Ukraine. The FATF called on its members to update their advisories requesting that their financial institutions give special attention to businesses and transactions with persons, including companies and financial institutions, in those countries or territories identified in the report as being non-cooperative.[196]

The FATF noted with concern the failure by the governments of Indonesia and Myanmar to make more substantive progress since June 2002. Although they have enacted some anti-money laundering measures, serious deficiencies remain that will inhibit implementation of comprehensive anti-money laundering systems.[197]

In February 2004, Egypt and Ukraine were dropped from the list of NCCTs due to their substantial implementation of anti-money laundering reforms.[198] The annual review report released on 2 July 2004 recognised the efforts of Guatemala and removed it from the NCCTs list.[199] According to the 2004 review report, the remaining jurisdictions under the NCCTs list are: Cook Islands, Indonesia, Myanmar, Nauru, Nigeria and Philippines.

2.5 Financial Stability Forum (FSF) and Global Economic Stability

Three general objectives define the scope of the FSF's work. The first is to identify points of vulnerability within the international financial system where detrimental

[196] Financial Action Task Force, above n 194.
[197] Ibid.
[198] Financial Action Task Force, above n 191.
[199] Financial Action Task Force, *Annual Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2004).

practices may fester and problems and crises may develop. The second is to make recommendations and to oversee the actions necessary to address these vulnerabilities. The third is to improve communications and the exchange of information among the various authorities responsible for promoting international financial stability.[200] The FSF noted:[201]

> Weakness in supervision and lack of co-operation by some OFCs together lead to two types of problems, which can be inter-related, in the oversight of the international financial system: prudential concerns, relating to the scope for effective supervision of internationally active financial intermediaries; and market integrity concerns, relating to the effectiveness of international enforcement efforts in respect of illicit activity and abusive market behaviour.

Of particular concern for the FSF is the general lack of transparency and oversight related to the financial activities originating in and flowing through OFCs. In this respect, its concerns overlap with those of FATF and OECD. However, while the FATF's and OECD's concerns are focused on specific issues, the FSF's remit is much broader.

As the FSF observes, "Implementation of standards varies considerably across OFCs, with some making serious efforts to adhere to internationally accepted standards, while others making little or no effort, or actively use supervisory laxity as a means of promoting their attractiveness to investors and customers."[202] To address this concern,

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[200] Financial Stability Forum, *Financial Stability Forum: What We Do* (2004) <http://www.fsforum.org/about/what_we_do.html> at 10 July 2004.
[201] Financial Stability Forum, above n 54, 2.
[202] Ibid 13.

the FSF, like the FATF and OECD, has adopted a "name and shame" strategy[203] to bring international pressure to bear on countries in order to encourage them to modify their practices. The FSF's approach is set out in its initial report entitled *Report of the Working Group on Offshore Centres*, which was delivered to the FSF's secretariat on April 5, 2000 (the "April 5, 2000 Report").[204] The FSF surveyed a number of OFCs and based on this survey, recommended that the IMF, in collaboration with the World Bank, undertake a more detailed assessment,[205] which is currently ongoing. This assessment focuses on the adherence by OFCs to international regulatory standards with the aim of encouraging OFCs to adopt, where they are identified to be deficient, internationally recognised regulatory standards. To encourage OFCs to participate in the process, a combination of coercion and incentives have been used.[206] They include, for example, the publication of a list of OFCs that details their progress to date in improving their regulatory structures as well as the provision of technical assistance to help countries bring their domestic regulatory structures into line with internally recognised standards.

Contrary to conventional political policy, it is argued here that the adoption of a pure 'name and shame' approach may even prove counterproductive. Tampering with reputational mechanisms might, at the same time, not only miss the target but also reach the wrong target.[207]

[203] Ibid 31.
[204] Ibid.
[205] Ibid 24.
[206] Ibid 29.
[207] Donato Masciandaro and Alessandro Portolano, 'It takes two to tango: International financial regulation and offshore centres' (Working Paper No 11/4, Universita di Lecce Department of Economics, 2003).

Of particular note are the seven criteria used by the FSF in preparing its April 5, 2000 Report to identify those countries deemed to be deficient in adhering to international regulatory standards, as these criteria are the same as those used by the FATF and OECD:[208]

1. Lack of due diligence requirements imposed on financial institutions operating within their jurisdictions to check and verify the identity of the owners and beneficiaries that stand behind these companies;
2. Inadequate rules imposed on financial institutions operating in their jurisdiction concerning the disclosure of material information to regulators and the financial markets;
3. Restrictions and limitations either directly or indirectly imposed on regulatory agencies that mean they are unable to develop adequate knowledge about the financial institutions and the activities they conduct within their jurisdictions;
4. Insufficient allocation of resources to regulatory agencies to allow these agencies to effectively monitor the activities of the financial institutions operating within their jurisdictions;
5. Limitations imposed on regulatory agencies in respect of co-operating with regulators in other jurisdictions particularly those in IFCs;
6. The existence of excessive secrecy laws that impede the exchange of information with foreign counter-parties; and
7. General lack of political will to improve the quality of regulatory oversight.

[208] Financial Stability Forum, above n 206, 13.

The FSF has noted that although these seven "regulatory weaknesses" exist to varying degrees within most OFCs, the standard of regulation varies across OFCs such that in some jurisdictions, the concerns to which these criteria give rise are minimal. The Bahamas, for example, is a highly respected OFC that is often singled out as making extensive efforts to comply with international standards.[209]

Several recommendations with respect to the future focus of efforts to improve the transparency of OFCs were made in the report and these can be grouped into three main categories:[210]

1. Measures to implement customer identification and record keeping requirements;
2. Initiatives to improve cross border co-operation with respect to the exchange of information; and
3. Plans to provide technical assistance in order to enhance the supervisory powers and abilities of domestic regulators.

The FSF recognises that adherence to international standards will not be automatic and that this goal will only be achieved over time. To assist OFCs in improving their domestic regulatory standards and capabilities, the April 5, 2000 Report set out a five stage process that the IMF and World Bank, with the FSF's assistance, is to oversee:[211]

1. An OFC makes a commitment to pursue reform;
2. The OFC conducts a self assessment exercise to identify deficiencies;

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[209] Hinterseer, above n 182, 258-9.
[210] Financial Stability Forum, above n 208, 28.
[211] Ibid 26.

3. The OFC, in co-operation with the FSF, develops a plan and associated set of milestones to remedy the deficiencies;
4. An independent third party conducts an independent review; and
5. The OFC works with the FSF to monitor its progress and continued compliance with international regulatory standards.

An important finding of the report was that, to date, OFCs do not appear to have been casual factors in creating instability within the financial markets. To date, no evidence has been found, for example, to support detrimental changes in interest or currency rates of any economy.[212] However, this does not mean that OFCs have neither been sources of past, nor will be of future, instability. As the financial markets grow ever more interdependent, detrimental market practices and the problems to which they give rise will be transmitted throughout the international financial system much more quickly. To the extent that they protect or promote questionable market practices, OFCs may be a source of instability. A conclusion of the report is a concern echoed by the FATF and OECD, which is that among the primary problems posed by OFCs to the stability of the international financial system, is inadequate supervision and regulation of the legal entities[213] being created in and operating both within and through these jurisdictions. The FSF's concerns, like those of the FATF and OECD, are that significant growth in the assets held by these legal entities and the financial flows they route through OFCs, in combination with a lack of transparency and

[212] Contrary to this, the paper entitled 'Tax Havens: Releasing the Hidden Billions for Poverty Eradication' by the Policy Department of Oxfam (Great Britain) suggested that "Tax havens and OFCs are now thought to be central to the operation of global financial markets. Currency instability and rapid surges and reversals of capital flows around the world became defining features of the global financial system during the 1990s. The financial crisis that ravaged East Asia in the late 1990s was at least partly a result of these volatile global markets." Policy Department of Oxfam (Great Britain) *Tax Havens: Releasing the Hidden Billions for Poverty Eradication* (2002) ATTAC International <http://attac.org/fra/toil/doc/oxfam2.htm> at 22 October 2003.
[213] In the context of the work pursued by each organisation, "legal entities" should be given wide meaning to include companies, trusts, charities and any other economic vehicle with legal personality.

growing market interdependence, increases prudential and market integrity concerns.[214] Together, the work of the FSF, FATF, and OECD is mutually reinforcing and it is therefore no wonder that OFCs have felt under threat from the international community.[215]

2.6 Wolfsberg Anti-Money Laundering (AML) Principles

On October 30, 2000, a new initiative to combat money laundering was unveiled[216]. What differentiates this initiative from many of the existing initiatives is that it has been put forward by the private sector, in the absence of coercion by a public sector body. Eleven banks originally signed the Wolfsberg Principles, which are a non-binding set of best practice guidelines governing the establishment and maintenance of relationships between private bankers and their clients.[217] As Dr Peter Eigen, the Chairman of Transparency International, observed on the release of the Wolfsberg Principles, "This is a unique event – few would expect the leading anti-corruption organisation and the leading banks to be standing on the same platform."[218] Guided by active and former FATF members who help ascertain whether these principles meet

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214 Financial Stability Forum, above n 210, 16.
215 Hintersecr, above n 209, 258-62.
216 The Wolfsberg Group, 'Leading International Banks Establish Anti-Money-Laundering Principles: Banks Work with Transparency International on Guidelines for Private Banking' (Press Release, October 30, 2000).
217 For a bank to become a signatory of the Wolfsberg Principles, the bank must merely deliver a signed commitment letter that incorporates the following statement: "We hereby confirm that having read and understood the Wolfsberg AML Principles (Global Anti-Money-Laundering Guidelines for Private Banking), as such principles appear on the Wolfsberg-Principles.com website as of October 30, 2000, we are committed to applying these principles in full and without conditions. Please add our name to the list of banks that wish to reflect their commitment to these principles on such website. Our name for purpose of inclusion in such list should be (name of bank and internet link)." The commitment should be signed by at least two authorised signatories. Letters not in strict conformity with the above will be rejected. Of note, the 11 original authors of the Wolfsberg Principles reserve the right to change or amend the Wolfsberg Principles at any time without the consent of the other parties. As worded, banks who subsequently register a commitment may be excluded from this process. This could hinder banks adopting the principles although for practical reasons this observation may be more apparent than real.
218 Peter Eigen, (Opening Statement at a Press Conference on the Release of New Anti-Money Laundering Guidelines, 30 October 2000).

international standards to control money laundering and making references to the Forty Recommendations where appropriate, the Wolfsberg Principles were formed.

Two years were required to draft the Wolfsberg Principles, which are named after the United Bank of Switzerland (UBS) training centre where the negotiations took place. Eleven banks took part in the process: ABN Amro Bank, Banco Santander Central Hispano, Barclays Banks, The Chase Manhattan Private Bank, Citibank, Credit Suisse Group, Deutsche Bank, Hongkong Shanghai Bank Corporation, JP Morgan, Societe del Gottardo and UBS.[219] The inclusion of UBS and the Credit Suisse Group are of particular note as they are two of Switzerland's most important financial institutions, while Switzerland itself continues to be one of the world's most important financial centres for private banking. However, notable by the absence of their signatures are Merrill Lynch, Morgan Stanley, Goldman Sachs, and any South American banks. It is also of note that of the 11 banks that signed the Wolfsberg Principles, most have been associated with financial and money laundering scandals of one form or another within the past decade.[220] It is of little wonder then that on the signature of the Wolfsberg Principles, some private bankers dismissed them as a mere public relations exercise.[221]

2.6.1 Analysis of the Workings of the Wolfsberg Principles

[219] The Wolfsberg Group, *Wolfsberg Anti-Money Laundering Principles on Privaté Banking* (2002) <http://www.wolfsberg-principles.com/privat-banking.html> at 10 July 2004. See Appendix K for the full list of the Wolfsberg Principles.

[220] There are 12 banks currently, with the inclusion of Bank of Tokyo-Mitsubishi Ltd.

[221] Cary Kochberg, 'Getting Your Principles Right – On New Regulations to Combat Money Laundering' (2000) Accountancy Age <http://www.accountancyage.com/News/1113604> at 30 October 2003.

The following analysis of the Wolfsberg Principles, is in greater detail than the previous analysis of the OECD and FATF recommendations, in that the Wolfsberg Principles as agreed to by the participating banks, are more relevant to Singapore as a Regional Financial Centre and in regards to its aspirations to become a global wealth management centre.

Wolfsberg Principle 1.1[222] states that the primary purpose of the Wolfsberg Principles is to ensure that the private banking services offered by the banks are not abused for criminal purposes. This is an extension of the existing international framework to control money laundering promoted by the FATF based on the know-your-client (KYC) principle. It therefore means that banks should not keep anonymous accounts and should not enter into or maintain commercial relations with counter parties either whose true identity cannot be readily identified, or whose activities reveal a questionable pattern of activity. This principle also manifests the idea that money laundering is best fought at the placement stage of the process by instituting various checks and disclosure requirements in order to make it as difficult as possible for criminally tainted money to enter the financial system. It is of interest that it is the private banker who introduces the client to the firm who is charged with the primary responsibility for discharging the obligation to establish that the funds of the potential client derive from a legitimate source. This is surprising. Placing an obligation on the private banker is to make him/her accountable to the bank in that if the client he/she introduces to the bank turns out to be engaged in nefarious activity, then he/she will be held accountable and probably lose his/her job. However, to a certain extent, the effect of this is to unduly shift the onus of responsibility from the bank on to the

[222] The Wolfsberg Group, above n 219.

private banker. The temptation may exist on the part of some private bankers or banks to redirect profitable, but questionable activities, to subsidiaries located in jurisdictions with relatively more flexible regulatory regimes.

The Wolfsberg Principles do not aim to address this situation as they are premised on an implicit assumption that the private bankers that work for the banks will not act in a manner that would lead to their collusion in, or the promotion of, money laundering activity. The reality, however, is that several of the most significant financial scandals recently involved the evasion of internal guidelines and policies that aimed to check questionable activity by individual bank employees. The Wolfsberg Principles obviously cannot accommodate situations where bank employees are determined to follow a course of action that runs counter to a bank's compliance requirements. However, banks need to be aware of the potential for such activity and, just as the client activities need to be monitored, the activities of individual private bankers may also need to be watched and reviewed.

Wolfsberg Principle 1.2[223] deals with identification and states that 'The bank will take reasonable measures to establish the identity of its client and beneficial owners and will only accept clients once this process has been completed.' Although Wolfsberg Principle 1.1 places primary responsibility on the private banker, the effect of Wolfsberg Principle 1.2 is that at least secondary responsibility is assumed by the bank. In other words, the bank assumes secondary responsibility for ensuring that reasonable measures are taken to establish the clients and beneficial owners. This requirement is consistent with FATF Recommendation 11.

[223] Ibid.

Wolfsberg Principle 1.2.1 focuses on the documentation required in respect of establishing a client's true identity. The required documents are in line with FATF Recommendation 10, which states that financial institutions '... should be required ... to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasionally or usual, when establishing business relations or conducting transactions...' For natural persons[224], identity will be established to the banks satisfaction where official papers (like a passport, drivers licence, or government identification card) or other evidence appropriate for the circumstances is provided to the bank. For corporations, partnerships, and foundations, documents concerning the due organisation and existence of the relevant entity will suffice. For trusts, the banks will require the identity of the trustees and evidence to prove that the trust has not only been formed in the correct and proper manner, but also that its existence remains valid.

Wolfsberg Principle 1.2.2 focuses on the need to establish the beneficial ownership of each account. Under this Wolfsberg Principle, 'Due diligence must be done on all principle Beneficial owners...'. This Wolfsberg Principle is in line with FATF Recommendation 11. In respect of natural persons under Wolfsberg Principle 1.2.2, '... when an account is opened in the name of an individual, the private banker must establish whether the client is acting on his/her own behalf.' If the private banker has doubts, then the bank will seek to establish the capacity in which, and on whose behalf, the accountholder is acting. Given that the bank is willing to assume this

[224] Natural persons means individuals, while in contrast legal persons means corporations, charities, trusts, and other organisations with legal personality.

responsibility, a statement of joint responsibility between the private banker and the bank would be more appropriate.

Wolfsberg Principle 1.2.3 concerns accounts held in the name of money managers and similar intermediaries. 'The private banker will perform due diligence on the intermediary and establish that the intermediary has due diligence process for its clients, or a regulatory obligation to conduct such due diligence, that is satisfactory to the bank.' A narrow reading of this Wolfsberg Principle would seem to impose an unduly onerous requirement. Given that the intermediary will invariably be a legal entity, the implication is that the private banker would have to develop an understanding of the operations of the entity in line with Wolfsberg Principle 1.2.2.

In addition, the private banker would have to ensure that the intermediary has in place a due diligence programme concerning clients or at the very least is subject to a regulatory obligation to conduct due diligence on prospective clients. Presumably, the private banker need only to establish that the intermediary has a due diligence programme or is subject to such a regulatory obligation and is not obligated to develop an understanding of the intermediary's business. It is arguable that it would have been more appropriate for the bank to have assumed sole responsibility for conducting the necessary due diligence. The reason is that the money manager or other intermediary are most likely to be at an institution with which the bank regularly deals and as such the bank as an institution will have more familiarity with the intermediary than that the individual private banker.

Wolfsberg Principle 1.2.4 concerns power of attorney and authorised signatories. This requirement is in line with Wolfsberg Principle 1.2.2 regarding natural persons. Wolfsberg Principle 1.2.5 concerns walk-in clients and electronic banking relationships. 'A bank will determine whether walk-in clients or relationships initiated through electronic channels require a higher degree of due diligence prior to account opening.' What this provision amounts to is a statement that in situations where a person who neither has a prior relationship with, nor is known to the bank (for example, through a course of prior dealing unrelated to private banking), approaches the bank in order to initiate a business relationship, the bank will determine if any higher level of due diligence is required with respect to this prospective client. In terms of the standard of due diligence required, the private banker will need to look to the Wolfsberg Principles to determine what, at a minimum, is required and then inquire about any additional requirements the bank may choose to mandate. To place the primary responsibility on the private banker to ensure that only clients whose wealth can be proven to be legitimate are accepted may, in this situation, be criticised. Here, an individual seeking to initiate a private client relationship will have approached the bank.

Consequently, it is not the private banker, but the bank that is in effect sponsoring the client for acceptance. As such, the bank should bear primary responsibility for conducting the due diligence especially if the bank seeks to impose additional due diligence requirements. This Wolfsberg Principles contemplates electronic banking relationships and its provisions are in line with FATF Recommendation 13. This recommendation states that 'Countries should pay special attention to money laundering threats inherent in new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes.'

Wolfsberg Principle 1.3 sets out what is required with respect to the due diligence process.[225] Of note, this Wolfsberg Principle states that it is only necessary to collect and record the information, but remains silent as to whether supporting documentation is required. Presumably, this is a matter for each bank to decide. Given the potential litigation and damage to reputation to which both the bank and private banker may be exposed, it would be helpful to have supporting documentation. Inclusion of the word "reputation" is odd. Surely, what is relevant is not the reputation of the business, but the substantial activity it conducts.

Consequently, requesting the last audited accounts or a business plan, where such documents exist and are available, would be more helpful than collection character references that are easy to fabricate. Meeting a prospective client is certainly helpful, especially where the meeting is documented in order to demonstrate that all reasonable steps had been taken in conducting due diligence. The principle goes on to state that 'Unless other measures reasonably suffice to do the due diligence on a client (e.g. favourable and reliable references), a client will be met prior to account opening'. However, accepting a client based solely on such a meeting should be resisted. The very fact that they cannot provide basis information should itself be a red flag indicating potential money laundering activity. Moreover, given that those engaged in

[225] Wolfsberg Principle 1.3: "It is essential to collect and record information covering the following categories: purpose and reason for opening the account, anticipated account activity, source of wealth (description of the economic activity which has generated the net worth), estimated net worth, source of funds (description of the origin and the means of transfer for monies that are accepted for the account opening), and reference to other sources to corroborate reputation information where available." The Wolfsberg Group, above n 223.

money laundering are individuals most likely to fabricate a story, a meeting without other evidence to demonstrate proof of identity and wealth may be of questionable value.

Wolfsberg Principle 1.4 states, 'There will be a requirement that all new clients and new accounts be approved by at least one person other than the private banker.'[226] Presumably, this person will be another employee of the bank. Given that the bank will be reviewing the due diligence conducted by the private banker, joint responsibility under Wolfsberg Principle 1.1 would be a more appropriate standard. Moreover, this Wolfsberg Principle would have been strengthen if a provision had been included that ran as follows: If the person who approves the new account believes that the due diligence conducted by the private banker was unsatisfactory, then, as in Wolfsberg Principle 1.2.2 (natural persons), the bank will take the necessary reasonable measures to ensure that the due diligence process is completed both in an acceptable manner, and to an acceptable standard.

Wolfsberg Principle 2 concerns client acceptance and sets out situations that require additional due diligence and attention.[227] Under Wolfsberg Principle 2.1, 'Numbered or alternate name accounts will only be accepted if the bank has established the identity of the client and the beneficial owner.' This goes against FATF Recommendation 10, which reads in part, 'Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names.'[228] Debate as to whether numbered accounts and similar financial instruments that disguise beneficial ownership, serve any useful commercial function are ongoing. Certainly numbered

[226] Ibid.
[227] Ibid.
[228] See Appendix G for a list of the FATF 40 Recommendations.

accounts and accounts in alternate names have played a prominent role in facilitating crime. However, the use of such accounts and similar financial instruments per se should not be prohibited so long as access to the relevant information can be gained when necessary by the appropriate authorities.

To strengthen this Wolfsberg Principle, and to bring it more in line with FATF Recommendation 10, adding a statement to the effect that such information will, subject to compliance with the relevant legal requirements, be made to the relevant local law enforcement and regulatory authorities as and when requires, would have been useful. In addition, the banks could have included a provision that states that they will monitor these accounts to ensure that a pattern of suspicious activity does not develop. In any event, the mere fact that a potential client requests that an account in an alternate name be opened and maintained may be enough, depending on the circumstances, to warrant the filing of a suspicious transaction report with the relevant authorities.

Wolfsberg Principle 2.2 states, 'The bank will apply heightened scrutiny to clients and beneficial owners resident in and funds sourced from countries identified by credible sources as having inadequate anti-money laundering standards or representing high-risk for crime and corruption.' This is in line with the FATF's work and with FATF Recommendation 21. Again, one set of developments that banks will need to closely monitor concerns the expanding number of predicate offences that will give rise to a money laundering charge. In the United States over 160 offences have been designated as predicate offences and this number is set to increase. The work of the OECD and current consideration being given to the inclusion of fiscal offences as predicate offences highlights this trend. Given the importance of tax considerations in shaping the business conducted within the private banking industry and the fine line that divides tax avoidance from tax evasion, banks will need to monitor these developments with extreme care.

Wolfsberg Principle 2.3 states that 'Risks associated with entities organised in offshore jurisdictions are covered by due diligence procedures laid out in these guidelines.' To closely monitor and scrutinise the nature of the financial activities originating in and being conducted through offshore jurisdictions will therefore be important. Banks will need to ensure that financial flows that come from offshore jurisdictions, and which are channelled through their organisations via the service they offer, are clean. In this respect, the FATF's work on non-compliant countries and territories should be taken into account by banks.

Wolfsberg Principle 2.4 concerns high-risk activities.[229] It states that 'Clients and beneficial owners whose source of wealth emanates from activities known to be susceptible to money laundering will be subject to heightened scrutiny.' Undoubtedly this will be important in order to protect the bank from potentially becoming involved in money laundering activity. In identifying individuals whose wealth emanates from questionable sources, banks should be aware of designations made under the US *Foreign Narcotics Kingpin Designation Act 1999*.[230] Under this act, the Department

[229] The Wolfsberg Group, above n 227.
[230] Measures can then be enforced against these individuals under the *International Emergency Economic Powers Act 1995* and Executive Order 12978. The office of Foreign Assets Control is responsible for implementing sanction against countries designated under the *International Emergency Economic Powers Act* as posing a threat to national security, economy, or foreign policy of the United States. In consultation with the Department of State, the Office of Foreign Assets Control develops a list of Specially Designated Narcotics Traffickers against which a Presidential Finding may be issued. In 1998, for example, the Office of Foreign Assets Control had listed 451 companies and individuals against which prohibition and blocking order had been made. The list includes four "Kingpins" of the

of the Treasury, Department of Justice, Department of State and the Department of Defence are required to consult each year to develop a list of recommended "Kingpins" for Presidential designation on 1 June of each year. Once designated, the Secretary of State, the Attorney General and other relevant bodies will consult and impose appropriate sanctions on American companies and citizens to prohibit them from engaging in transactions with these "Kingpins" and their associates. The jurisdiction claimed by the United States in enforcing its money laundering laws is becoming ever more expansive. Banks, so long as they conduct business either in or through United States, will need to be cognisant of developments such as these and adjust their internal compliance and training programmes as appropriate.

Wolfsberg Principle 2.5 concerns high-risk activities.[231] 'Individuals who have or have had positions of public trust such as government officials, senior executives of government corporations, politicians important political party officials etc and their families and close associates require heightened scrutiny.' This Wolfsberg Principle is in line with the OECD's work on corruption.[232] What this principle implies about the democratic process is of note. To a certain extent, it is a manifestation of the trend inherent in the expanding scope of money laundering laws that concerns how banks relate to their clients. The legal sanctions that can be imposed following a conviction for money laundering mean that banks must now approach client relations from a position of suspicion in contrast to the past where clients were at least given the

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Cali Cartel. The listing of Julio Casesar Nasser David alone affected 154 companies and 292 additional individuals involved in his organisation's legal activities. See United States Department of the Treasury, *Treasury under Secretary (Enforcement) Raymond W Kelly. House Committee on Banking and Financial Services*, 11 June 1998. See also United States Department of the Treasury, *Treasury under Secretary (Enforcement) Raymond W Kelly, House Judiciary Committee on Crime*, 24 July 1997.

[231] The Wolfsberg Group, above n 229.

[232] See appendix L for a list of the initiatives put forward by the OECD related to corruption. See also Society for Advanced Legal Studies Anti-Corruption Working Group, *Banking on Corruption: The Legal Responsibilities of Those Who Handle the Proceeds of Corruption* (2000 Society for Advanced Legal Studies, 2000)

benefit of the doubt. The effect of this Wolfsberg Principle, however, is to state that public officials cannot be trusted. In fact it implies, precisely because they hold a position of public trust, government officials should not be trusted to be engaged in commercial activities that are entirely clean and legal in nature. When moving from the realm of theory and the idea that the rule of governments ought to be based solely on principles of justice into reality and the realisation that the interests of the latter may be sacrificed, it opens the possibility for corruption to spread. Unfortunately, this Wolfsberg Principle manifests a practical reality of public life.

Wolfsberg Principle 3 concerns updating client files.[233] 'The private banker is responsible for updating a client's file on a defined basis and/or when there are major changes.' This Wolfsberg Principle merely manifests prudent commercial practice, while the information such an exercise provides should be views as part of the ongoing competitive need to provide and tailor services to clients. Of note, the private banker's supervisor or an independent control person will review relevant portions of the client files on a regular basis to ensure consistency and completeness. This is important as it means that banks will take some responsibility for ensuring that their clients are not engaged in questionable activity. To ensure that the exercise is conducted in an objective manner, an independent person within the bank should of course perform this function. As client files are updated, the requirements of FATF Recommendation 12 should be kept in mind.

[233] The Wolfsberg Group, above n 231.

Wolfsberg Principle 4 focuses on the practices associated with identifying unusual or suspicious activities.[234] Wolfsberg Principle 4.1 states, 'The bank will have a written policy on the identification of and follow-up on unusual or suspicious activities. This policy will include a definition of what is considered to be suspicious or unusual and give examples thereof.' It goes on to states that unusual or suspicious activities may include account transaction or other activities that are not consistent with the due diligence file, cash transactions over a certain amount and pass-through/in-and-out transactions. The list is not exhaustive, which is necessary given the dynamic nature of the money laundering process.

In brief, money laundering will only be successfully controlled where banks, regulators and law enforcement agencies are able to work together in co-operative manner. As part of building a co-operative relationship, banks will require feedback on the usefulness of the information they provide to regulatory and law enforcement agencies. Only through adequate feedback will it be possible for banks to maintain a comprehensive and up-to-date compliance programme. As part of the process it will be important for regulatory and law enforcement agencies to communicate the transactions and activities to the banks and they believe constitute suspicious activity. In this respect, the work of the FATF, in particular its work on identifying money laundering typologies, methods, and trends, will be of use[235], as well as the biannual report that the Financial Crimes Enforcement Network has begun to publish on the same matter.[236]

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[234] Ibid.
[235] The FATF's work on money laundering typologies can be found at www.oecd.org/fatf.
[236] The biannual report published by the Financial Crimes Enforcement Network can be found at www.treas.gov/fincen.

Wolfsberg Principle 4.2 deals with the identification of unusual or suspicious activities and states that unusual or suspicious activities can be identified through monitoring transactions, contact with the client him/herself, third party information, and the private banker's internal knowledge of the client's environment. This non-exhaustive list is sensible.

Wolfsberg Principle 4.3 focuses on how suspicious activities are to be followed-up. It states that the private banker, management, or the "control function" will conduct an analysis of the background of the unusual or suspicious activity. If no plausible explanation for the suspicious activity can be identified, than a decision will be made that involves the "control function" concerning whether the business relationship is to be continued with increasing monitoring, or whether to be cancelled, or reported to the authorities. This principle goes on the state that '... senior management may need to be notified'. In general, senior management should he appraised of all suspicious activity reports that are being made. At the very least, a summary of the reports should be reviewed at each hoard meeting so that senior management will be aware of the suspicious activity to which their bank may be exposed and how this exposure has changed over time.

Wolfsberg Principle 5 concerns monitoring and states that a sufficient monitoring programme must be in place.[237] Like Wolfsberg Principle I.I, primary responsibility is placed with the private banker who must monitor the activity of the account. From one perspective this is inappropriate because, as Wolfsberg Principle 5 states (and in line with Wolfsberg Principle 4.3), the private banker will be familiar with the activity

[237] The Wolfsberg Group, above n 234.

of, and significant transactions conducted through, the account and will be especially aware of unusual or suspicious activities. However, the same critique made against the banks under Wolfsberg Principle 1.1 for not accepting joint responsibility along with the private banker can be made here. This critique is particularly relevant given that Wolfsberg Principle 5 goes on to state that the bank will decide to what extent fulfilment of this monitoring responsibility will need to be supported through the use of automated systems or other means.

This is a variation of FATF Recommendation 22, 'Countries should consider implementing feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.'[238] Although this recommendation applies to "countries", FATF Recommendations 8 states that Recommendations 10 to 29 should apply to banks as well. After all, to leave with the bank the decision of how much of its operating budget to allocate to technology with respect to compliance issues, is a commercial necessity. Given the desire to avoid the adverse publicity associated with a money laundering scandal, the bank is expected to allocate an acceptable portion of its budget to adopting and implementing the appropriate technology that would easily allow the private banker to meet his/her responsibility.

Wolfsberg Principle 6 concerns control responsibilities.[239] It states that a written control policy will be put in place by each bank establishing standard control procedures to be undertaken by the various "control layers" meaning private banker,

[238] Financial Action Task Force, above n 177.
[239] The Wolfsberg Group, above n 237.

independent operating unit, compliance, internal audit etc. The control policy will cover issues of timing, degree of control, areas to be controlled, responsibilities and follow-up. In covering these matters, the control policy must delineate clear lines of responsibility and provide those designated as responsible with sufficient power and authority to implement the policy. Invariably the control policy will obviously be tailored to each bank's internal idiosyncrasies. In tailoring this policy, the role to be performed by regulatory and law enforcement agencies in providing feedback is again worthy of note. Feedback will be important as it will help banks to be aware of both traditional and emerging money laundering threats and to adapt and tailor their control policies as appropriate.

Wolfsberg Principle 7 concerns reporting.[240] It states, 'There will be regular management reporting established on money laundering issues' and then lists some of the items that will be included in the reports. A glance at Wolfsberg Principle 4.3 may lead to the conclusion that this requirement has already been covered. The difference is that in Wolfsberg Principle 4.3, the word "senior" is included, while in Wolfsberg Principle 7, it is absent. Wolfsberg Principle 7 merely states that regular reports to management will be made. It does not say how far up the management hierarchy that these reports should go. Any system of reports will of course need to be tailored to the idiosyncrasies of the individual bank. In addition, maintaining such general working introduces flexibility and therefore helps to facilitate the objective of promoting the adoption of the Wolfsberg Principles by the widest number of banks as possible. Money laundering is a type of risk about which banks need to be aware. It is a form of market risk which can cause banks to lose considerable amounts of money.

[240] Ibid.

The problem is not easy an easy risk to quantify. Assessing the nature of the threat posed by money laundering to a bank is certainly more of an art than a science. In this respect, useful information can be taken from the suspicious transaction reports filed by the banks, and from the background information and circumstances that cause the report to be made. This information need to be repackaged and presented to senior managers in a form that will allow senior management to understand the potential threat to which their bank may be exposed. As such, stating, "There will be regular senior management reporting" could have strengthened this Wolfsberg Principle.

Wolfsberg Principle 8 concerns education, training, and information.[241] 'The bank will establish a training programme on the identification and prevention of money laundering for employees who have client contact and for Compliance personnel.' Regular training, described as annual training, will include training on how to identify and follow-up on unusual or suspicious activities. In addition, employees will be informed about any major changes in anti-money laundering laws and regulations. However, with respect to the undertaking that '... employees will be informed about any major changes in anti-money laundering laws and regulations', it would have been more appropriate for each bank to have undertaken in this principles to inform their private bankers of these changes in a timely manner. In addition, they should be provided with an adequate explanation of what these changes entail.

Given the wide scope that is characteristic of criminal money laundering laws in the United Kingdom and the United States, a private banker, when he/she transacts

[241] Ibid.

business either through London or New York, could be exposed to the money laundering laws of these countries. Moreover, the civil penalties associated with money laundering are also onerous. As such, it is in the interests of the banks to ensure that their private bankers are adequately educated with respect to their legal obligations. In general terms, the banks should ensure that all their employees have appropriate training concerning the risks posed by money laundering to the banks and the legal obligations they are under.

Wolfsberg Principle 9 covers record retention requirements.[242] It states that each 'banks will establish record retention requirements for all anti-money laundering related documents.' It goes on to state that 'The documents must be kept for a minimal of five years.' This Wolfsberg Principle is in line with FATF Recommendation 12 which is based on the idea that records kept by the bank must be sufficient to enable a client's course of dealing to be reconstructed so as to provide, if necessary, evidence of criminal behaviour. Presumably, this Wolfsberg Principle will include within its scope all account opening information, and information related to transactions conducted though the accounts including the amounts and types of currency involved. One of the side effects of the know-your-client policy promoted to control money laundering activity is the amount of paper it generates in terms of the documents that need to be stored. It will therefore be important that proper storage guidelines exist and that any data stored electronically can still be retrieved as the bank updates the technology it uses.

[242] Ibid.

Wolfsberg Principle 10 covers exceptions and deviations.[243] It states, 'The bank will establish an exception and deviation procedure that requires risk assessment and approval by an independent unit.' Unfortunately, this Wolfsberg Principle states nothing further and appears to be a catch-all provision. It may have been more appropriate to state this Principal earlier on, both around Wolfsberg Principle 1.1 and possible reiterating it around Wolfsberg Principle 5. Placed in these two locations, this Wolfsberg Principle would have reinforced the idea that the reality is that the private banker and the bank must both share responsibility for ensuring that clients are not involved in questionable activity both at the time they are accepted as clients and throughout the time the banker-client relationship subsists.

Wolfsberg Principle 11 concerns the creation of an anti-money laundering organisation.[244] It states, 'The bank will establish an adequately staffed and independent department responsible for the prevention of money laundering (e.g. compliance, independent control unit, legal).' The establishment of such as organisation will be important and its structure should conform to the characteristics of the organisation. Banks that have signed the Wolfsberg Principles should give consideration about how to institutionalise a process by which the lessons learned through implementing the Wolfsberg Principles may be used to prevent future money laundering problems. In particular, the banks may consider creating an informal "Wolfsberg Forum" to discuss money laundering related matters as they affect the private banking industry on an ongoing basis. Certainly, there are lessons that could be shared through sanitised examples, contact to be made, and collective best practice guidelines to be discussed in pursuit of a level commercial playing field. Given that

[243] Ibid.
[244] Ibid.

intra-governmental forums such as FATF exist, a similar private sector body would at least be useful in providing the industry with a united voice to deal with organisations like the FATF.[245]

With the exception of Bance Santander Central Hispano, the other 11 banks which had signed the Wolfsberg Principles (ABN AMRO Bank N.V., Bank of Tokyo-Mitsubishi Ltd, Barclays Bank, Citigroup, Credit Suisse Group, Deutsche Bank AG, Goldman Sachs, HSBC, J.P. Morgan Private Bank, Société Générale and UBS AG) have branches in Singapore. All banks in Singapore had their license approved by the Monetary Authority of Singapore (MAS), and would be operating in the accordance of the Bank Association Guidelines of Singapore (ABS), guided by regulations and proper training to combat money laundering and conduct due diligence.

2.7 Conclusion

The growing concern which the rest of the non-OFCs have about the OFCs is represented by all the regulatory bodies' initiatives. The initiatives put forward by regulatory bodies and non-OFCs as analysed in this chapter are:

- OECD's work on harmful tax practices being used to identify how tax and money laundering issues are increasingly interlinked.
- FATF's work on non-compliant countries and territories which reveals the money laundering threats posed by OFCs and how they can be dealt with.

[245] Hinterseer, above n 215, 266-80.

- FSF's focus on the operation of the global financial system which is being examined to identify how the specific issue of lack of transparency with respect to the financial activity being conducted within and through OFCs is being addressed.
- The Wolfsberg Anti-Money Laundering Principles (the "Wolfsberg Principles") on private banking being used to assess a private sector initiative to control money laundering that is being pursued by certain banks.

In addition to the earlier mentioned organisations, there are many others, both public and private, that are pursuing various money laundering control initiatives. Their activities have led to a number of agreements, memoranda of understanding, statements, codes and standards of conduct, all of which have legal significance. As such, their work may be characterised as what Professor Joseph Norton calls "soft law", which , adapting Professor Norton's definition[246], may be understood as follows: legally significant international rules emanating from international bodies that are intended to be binding (notwithstanding their non-legal characterisation), and which subsequently come to be enforced or adhered to in some form.[247]

What should be kept in mind throughout, is that each of these initiatives forms a kind of "soft law". None has resulted in the creation of legal international rules in the traditional sense in that these initiatives have not culminated in the signature of any formal treaties or the creation of legal customs. In fact, debate persists as to whether

[246] Joseph Norton, *Devising International Bank Supervisory Standards* (1995) xxv. Professor Norton's discussion is focused around the work of the Basle Committee and the definition of soft law that Professor Norton actually uses is as follows: "... liberty is taken in using the term 'international soft law' to depict 'legally significant international rules' of the Basle Committee emanating from national supervisory authorities that were intended by these authorities to be binding (notwithstanding their non-legal characterization) among the involved authorities and that subsequently became enacted into national laws or administrative rules subsequently in accord with the substance and intent of the Basle Committee pronouncement."

[247] Hinterseer, above n 245, 224.

nternational rules outside of traditionally recognised sources of international law, like reaties and legal customs, exist. The reason this debate is ongoing is that the principles of state sovereignty and equality of states means that neither a state nor the ;itizens of a state can be made subject to the laws of another state in the absence of ;ome form of enabling legal mechanism.

\n important challenge that has confronted regulatory agencies in recent years is how o effectively monitor the operations of banks, their subsidiaries, and the financial ıctivities in which they are engaged. The approach that has been adopted is to create a lexible supervisory structure by allowing banks to develop internal mechanism of isk control and management. As such, the Wolfsberg Principles represent an element)f this flexible regulatory approach. These principles constitute a series of measures ıdopted voluntarily by certain banks. They focus on monitoring and collecting nformation on the activities of clients in order to be in a better position to identify ;uspicious activities.

t is in recognising that the establishment of policies and procedures to adhere to these guidelines, is the responsibility of management. As a set of guidelines as to how nanagement is to fulfil this responsibility, the Wolfsberg Principles provide the starting point with respect to private banking activities. When analysing the Wolfsberg Principles, it is important to remember that they are a voluntary code of best practice guidelines. As Dr. Eigen observes, 'The language is blunt. The burden for monitoring the implementation and day-to-day operations of the guidelines rests squarely with the banks. Their reputations are at stake.'[248] Although the Wolfsberg

[48] Eigen, above n 218.

Principles may be dismissed as a mere public relations exercise, if implemented with vigour, they have the potential to make a meaningful contribution to combating money laundering.[249]

As seen by the analysis in this chapter, the supranational closely related directives of the OECD, FATF and FSF have focused on the four major areas of "harmful tax practices and money laundering" and "confidentiality and exchange of information" which will now be further analysed in the following two chapters. This will then allow consideration of the OFC's responses including that of Singapore.

[249] Hinterseer, above n 247, 281-2.

Chapter 3: Harmful Tax Practices and Money Laundering

3.1 Introduction

In the previous chapter, the analysis of the supranational approaches to OFCs showed that two of the four main concerns relate to harmful tax practices and money laundering.

The increasing globalisation of the banking and securities businesses presents a whole new range of problems to the domestic regulators. It is clear that the traditional concept of jurisdiction limited by territorial boundaries is wholly inadequate in the context of the developing global market. Simultaneously, as demonstrated in the previous chapter, there has been an increasing recognition of and determination to tackle money laundering which is an inherent feature of international and organised crime. There has been a growing appreciation and acceptance, in the securities industry, of the principle of the 'integrity' of the market; in other words, that confidence in financial markets can only be preserved by the provision of simultaneous and, where possible, instantaneous access for all to all relevant information.[250]

In this chapter, the issues of harmful tax practices and money laundering are analysed in the context of the supranational directives, thus laying the foundations for the subsequent responses of the OFCs. First, some definitions are required.

[250] Francis Neate and Roger McCormick (eds), *Bank Confidentiality* (1990) xix.

3.1.1 Tax Avoidance

In the legal debate of tax avoidance, the primary focus is clearly on contrived and artificial schemes, which do not change the substantive character of an activity or transaction but may serve nevertheless to the activity within some tax-exempt or more tax-favoured legal category. Assuming a literal interpretation of the legislation by the courts, minor or essentially cosmetic changes may allow quite massive tax avoidance without significant cost to the taxpayer whether in legal fees, or, in economic terms, from the adoption of inferior business forms or commercial practices.

Substitutability between taxable and non-taxable alternatives may accordingly be most perfect and, although revenue losses may be very large, the direct efficiency losses or excess burdens may be small. As Cooper asserts, the lost revenue must, however, be made up by rate increases on a narrower base, thus increasing welfare cost, or public expenditure benefits must be reduced. The social costs of tax avoidance in this narrow legal sense may accordingly be very large and are not necessarily diminished by the absence of direct efficiency losses. In equity terms, tax progressivity may be greatly reduced without offsetting effects from excess burden and, since certain types of artificial schemes may not be widely available, horizontal inequities may be considerable.[251]

Tax avoidance in the narrow legal sense remains therefore highly objectionable and there is a view that it must be dealt with if the tax system is to retain credibility and if

[251] Graeme S Cooper, *Tax Avoidance and the Rule of Law* (1997) 25-7.

tax compliance and social acceptable of the democratic budgetary system is to be preserved.[252]

3.1.2 Tax Evasion

Tax evasion is an illegal activity. It is a criminal as well as a civil wrong. It will often involve the taxpayer hiding assets; or, alternatively, failing to declare income and/or capital gains; or, in the further alternative, making a fraudulent return by deliberately under-declaring income/gains to the revenue authorities of the country where he resides for tax purposes.

In England the approach of the revenue authorities to tax avoidance used to sum up in a decision of Lord Tomlin in *IRC v Westminster* and has been cited in courts throughout the common law system:[253]

> Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Taxes Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue (the IRS) or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

[252] Ibid, 25-7, 71-2.

[253] IRC v Westminster [1936] AC1. This speech may no longer represent the modern approach in the UK which has now enacted a number of anti-avoidance provisions and which is now more inclined to strike down sophisticated anti-avoidance structures without any commercial benefit (other than to avoid tax) as a 'sham' and collect tax on the basis of the reality of the structure of transaction as a whole. See *Ramsay v IRC* [1982] AC300. However, the quote sums up the traditional view of tax avoidance.

On the other hand, tax evasion involves a taxpayer cheating the revenue authorities. Dishonesty will generally be present. The scheme to evade tax will include fraud, either

- a deception - a deliberate dishonesty such as a misrepresentation of income, earnings, profits, assets etc. on the taxpayers' annual tax return, supporting statements and/or accounts, or
- a deceitful concealment of income and/or assets etc.

The type of tax fraud illustrated above is a criminal offence. It is often an offence contrary to the relevant tax legislation in the jurisdiction where the taxpayer is deemed to reside for tax purposes. It may also be an offence contrary to the general criminal law, particularly if the taxpayer makes an actual misrepresentation to the revenue authorities, for instance, in his accounts or on his tax return. In such case the taxpayer could find himself criminally liable for offences of fraud, forgery, false accounting or deception. [254]

In both the United Kingdom and the United States 'tax avoidance' is doing what you can within the law: it has always been regarded as entirely lawful, albeit requiring or relying on expert advice. On the other hand, 'tax evasion' has always been (and remains) unlawful, and depending on its severity and extent, 'evasion' may also be criminal.[255] In Australia, some forms of tax avoidance are illegal and this was made

[254] Cooper, above n 251, 84-5.
[255] Tim Bennett, *Tolley's International Initiatives Affecting Financial Havens* (2001) 28.

clear under the provisions of Part IVA of the Income Tax Assessment Act 1936 (Commonwealth) and tax evasion is always against the law.[256]

3.1.3 Money Laundering

According to Blum, clean money is worth more than dirty money. Clean money[257] can be invested in profitable activities, or spent on consumption, more or less conspicuous, without risk of incrimination. Dirty money can generally only be invested or spent less profitably, less visible, and at the risk of punishment. It also carries the risk of being used as evidence of the initial crime. Virtually all income from criminal activities must be disguised to be of use to the criminal. Money laundering is that process of disguise.[258] It has remained high on the law enforcement agenda since the 1990s.[259] It has moved quickly from being marginal in the early 1980s, not even a ground for confiscation, let alone a crime, to a position at the centre of efforts for co-operation in the 'war on drugs', the 'struggle against organised crime' and the 'war on terrorism'.[260] These efforts as have been previously noted, are international in scope and consequently require revision of the traditional view of the relationships between national systems of criminal justice.

3.2 OECD Measures to Combat Harmful Tax Practices

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256 *Income Tax Assessment Act 1936* (Cth) pt IVA.

257 Money untainted by criminal association.

258 For Jack Blum et al, Financial Haven, Banking Secrecy and Money-Laundering UNDCO technical series issue 8 (1998 United Nations) 6, the origin of the term is in the use of cash based retail service industries like laundries to disguise the origins of cash acquired through rackets in the United States. The object was to mix legally and illegally obtained cash to avoid the attention of corrupt police officers, competitors, and (from the time that prosecution for tax evasion came to be a potent weapon in the hands of the authorities unable to being successful prosecutions for specific substantive offences) the tax authorities.

259 G Richard Strafer, 'Money Laundering: the Crime of the '90s'' (1989) 27 *American Criminal Law Review* 149.

260 Peter Alldridge, *Money Laundering Law* (2003) 1.

3.2.1 OECD's Concepts of Unfair Tax Competition

It is argued that, the solution that is now being urged by OECD is that small or developing countries with OFCs be pressed into service as subsidiary tax enforcers to boost OECD coffers. The OECD approach is multifarious, involving the criminalisation of tax avoidance and the elimination of various forms of tax competition from these OFCs in all geographically mobile service industries, including financial, but also distribution services, shipping, service industries and company headquartering.

But what could be more reasonable? That, in the interest of comity between nations and the protection of their mutual sovereignty, nations should help each other catch 'tax cheats' by insisting on transparent legal structures and exchange of tax information on request or even spontaneously? Is this not a self-evident case of collective interest in effective law enforcement?[261]

And if nations are successful in increasing revenue by deterring or catching tax cheats, will they not be able to lower tax rates, improve economic efficiency, expand output and deliver rising living standards?

So stated, the current OECD campaign to eliminate tax havens seems to make both legal and economic sense.

[261] Antoine, above n 133, 314.

But, as with many apparently self-evident truths propounded in the popular press, such propositions may not withstand closer examination.

The OECD argues that tax competition[262] may alter the structure of taxation (by shifting part of the tax burden from mobile to relatively immobile factors and from income to consumption) and may hamper the application of progressive tax rates and the achievement of redistribution goals.[263]

But is the OECD correct to see tax competition as a problem to be solved hy enforcing residence (or pseudo-residence[264]) taxation of mobile capital income?[265]

If tax competition shifts the tax burden from mobile to relatively immobile factors, it is doing the world a service. Economic theory has always held that, from an efficient point of view, taxes should be laid on things which are inelastic in supply (of which the prime example is land rents). As for progressive marginal income tax rates and income redistribution, there are many economists who would argue that both are economically inefficient. It is odd that a report which complains[266] that tax havens are

[262] Indeed, the OECD seems to be intent on eliminating what they regard as 'harmful' fiscal competition in vast segments of key global industries. However, on closer inspection, their efforts seem to be focused on industries in which OECD countries are more competitive. Hence the rather telling omission of agriculture, which has 'harmful' fiscal competition amounting to USA$360 billion provided by the OECD countries to their farmers at the expense of farmers in many poor developing countries as well as countries such as Australia and New Zealand. The agricultural sector is never mentioned in all the OECD exhortations for other countries to eliminate harmful fiscal practices. Ibid 315.

[263] Organisation for Economic Co-operation and Development, above n 156, 14[23].

[264] In fact, the operation of controlled foreign company or trust income attribution rules often means that OECD countries are asserting the right to tax foreign income of a foreign company or foreign trust (even several times removed), even if their residents have no legal or equitable right to that income. The residence 'principle' is really becoming in reality a mercantilist export tax on capital in the form of perpetual taxation hy the country of residence of the original source of the mobile capital. Antoine, above n 261, 315-6.

[265] Ibid.

[266] Organisation for Economic Co-operation and Development, above n 263, 15[25].

"free riders" accepts as given the "free riding" implicit in redistributive taxation.[267] Some "free riders" are more equal than others, it seems.[268]

Real-world constraints mean that tax competition can be inefficient or harmful in the sense that it distorts the delivery of public goods and services, as well as the allocation of resources in the private market. Distortions in the level and pattern of the provision of public goods and services arise in a non-cooperative environment in which governments compete for mobile individuals, capital, and consumption.[269]

The competitive process is reflected in differences in tax rates and structures that are intended either (1) to reflect differences in preferences for public goods and services and differences in redistributive goals, or (2) to attract mobile tax bases. In either instance, mobile individuals or capital may respond to the tax differences with allocative effects. Consider the example described above. Inefficient tax competition between jurisdictions A and B can arise in one of two simple ways. First, jurisdiction A may wish to increase its tax rate above that in jurisdiction B in order to fund an increase in desired public goods and services. If the relevant tax base is mobile, jurisdiction A may perceive itself to be constrained in raising its rate, since the mobile factors of production may migrate to jurisdiction B in order to avoid the increased transfer payments. The migration is induced by the character of the taxes as transfers

[267] Ibid 14[23].

[268] Terence Dwyer and Deborah Dwyer, 'Transparency versus Privacy: Reflections on OECD Concepts of Unfair Tax Competition' (2002) 9 *Journal of Financial Crime* 330, 333.

[269] The seminal statement of this proposition is found in Wallace E Oates and Robert M Schwab, 'Economic Competition Among Jurisdictions: Efficiency-Enhancing or Distortion-Inducing?' (1988) 35 *Journal of Public Economics* 333-54. The tax competition literature essentially explores the fundamental issue posed by this proposition. See John D Wilson, 'Theories of Tax Competition' (1999) 52 *National Tax Journal* 269-304. See also Andreas Haufler, *Taxation in a Global Economy* (2001). The basic models are described in George R Zodrow and Peter Mieszkowski, Pigou, Tiebout, 'Property Taxation and the Underprovision of Local Public Goods' (1986) 19 *Journal of Urban Economics* 356-70; and John D Wilson, 'A Theory of Interregional Tax Competition' (1986) 19 *Journal of Urban Economics*, 296-315.

and not as user charges for goods or services provided to the factors of production. Alternatively, jurisdiction A or B may lower its tax rate in an effort to attract mobile factors of production away from the other jurisdiction. In either instance, the competition between the two jurisdictions for a mobile tax base may induce them to lower tax levels below those required to support public goods and services desired by residents. In effect, the constraint imposed by other competing jurisdictions prevents the provision of public goods and services to the point at which marginal costs equal marginal benefits.[270]

The economic literature attributes this inefficient allocation of public goods and services to the "horizontal fiscal externality" or "horizontal spillover effect" arising between two or more governments at the same level (that is, subnational or local governments).[271] These labels refer to the fact that, in setting tax levels to fund public goods and services, policy makers in a particular jurisdiction consider only the welfare of their residents, and not that of the residents of a competing jurisdiction that may benefit from the migration of factors of production in response to increased taxes. This externality may cause policy makers to forgo the tax increase and associated public goods and services in order to avoid "tax base flight." In terms of the allocative effects, it does not matter whether differences in tax rates and tax structures that would otherwise arise are attributable to differences in preferences for public goods and services and redistributive policies, or to an attempt to attract mobile tax bases with "beggar-thy-neighbour" policies.[272]

[270] Tim Edgar, 'Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage' (2003) 51 *Canadian Tax Journal*, 1079.
[271] David E Wildasin, 'Interjurisdictional Capital Mobility: Fiscal Externality and a Corrective Subsidy' (1989) 25 *Journal of Urban Economics* 193-212.
[272] For other views on this point, see Michael Keen, 'Preferential Regimes Can Make Tax Competition Less Harmful' (2001) 54 *National Tax Journal* 757-62 (suggesting that

3.2.2 The Effects of Globalisation and Liberalisation on Harmful Tax Practices

Tax competition refers to the competition to attract investment or funds by providing an attractive fiscal environment. It usually takes the form of offering special incentives, in the form of tax exemptions or reductions, low rates of tax or by having no tax at all.[273]

Earlier, it was discussed how, liberalisation and globalisation have led a number of governments to introduce special tax structures. Today virtually every high tax country has adopted some type of preferential tax regime. As noted previously, over recent years, the number of tax havens has more than doubled, while the value of investments into low tax jurisdictions has expanded exponentially.

Because these tax policies may result in the siphoning off of parts of countries' tax bases, this proliferation of what are considered harmful preferential tax regimes and tax havens has become a growing concern for governments.

The position of the OECD is that, if the situation is not redressed, governments may increasingly be forced to engage in competitive tax bidding in order to attract or retain

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targeted tax preferences are preferable to general rate reductions, because they confine the efficiency-reducing effects of tax competition to mobile tax bases that are the targets of the preferences); and Eckhard Janeba and Michael Smart, "Is Targeted Tax Competition Less Harmful Than its Remedies?" International Tax and Public Finance (forthcoming) (finding that restrictions on tax competition are more likely to be desirable when tax bases are on average highly responsive to a coordinated increase in tax rates by all governments, and when tax bases with large domestic elasticities are mobile internationally).

[273] Alex Easson, *Taxation of Foreign Direct Investment: An Introduction* (1999) 162-3.

mobile activities, thus leading to a "race to the bottom", in which location and financing decisions become primarily tax driven.[274]

3.2.3 Tax Harmonisation & Withholding Tax

On 3 June 2003, the EU Council of Finance Ministers, ECOFIN, finally reached an agreement on the EU Savings Tax Directive. The Directive is to be implemented as of 1 January 2005.

The Savings Tax Directive is, not a stand alone issue but a vital part of the EU "code of good conduct" package, which also includes the abolition of harmful corporate taxation measures that distort fair competition between Member States and a directive concerning tax on royalties.

One of the main issues in connection with the introduction of the Savings Tax Directive is whether to introduce a withholding tax or exchange of information between the Member States' tax authorities. The strongest opponent against a withholding tax has been the UK, taking into consideration the UK based Euro bond market. The strongest opponent against an exchange of information has been Luxembourg supported by Belgium and Austria, all protecting their bank secrecy and financial infrastructure. The final outcome of the negotiations is a compromise.

The tax effects

[274] Spitz, above n 129, 235-6.

Starting from 1 January 2005, 12 Member States[275] are to automatically exchange information concerning EU resident physical persons' interest income. The exceptions are Luxembourg, Austria and Belgium, which will keep their bank secrecy regulations and these countries will instead impose a withholding tax as a main rule. Luxembourg, Austria and Belgium will, however, provide the individual account holder with an option between the withholding tax and exchange of information. The withholding tax will increase over time as follows: 15% from 1 January 2005, 20% from 2008 (three years after the implementation), and finally 35% from 2011.[276]

A Stumbling Block

By insisting on retaining their banking secrecy laws, Luxembourg, Austria and Belgium are following Switzerland's course. Switzerland has repeatedly refused to comply with banking disclosure standards and has offered to pay the EU 75 percent of returns generated from a withholding tax in exchange for not having to reveal the identity of its customers.

Other non-EU member states in Europe, such as Liechtenstein, Andorra, Monaco and San Marino, must also levy a tax on EU citizens' savings and pay three-quarters of it to the home country.[277]

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[275] Germany, France, Italy, the Netherlands, Denmark, the Republic of Ireland, United Kingdom, Greece, Portugal, Spain, Finland, Sweden

[276] Nordea Bank S.A. Luxembourg, *The EU Savings Tax Directive* (2003) <http://www.nordea.ch> at 3 November 2003.

[277] Deutsche Welle, *EU Agrees on Taxing Foreign-Earned Interest* (2003) <http://www.dw-world.de> at 3 November 2003.

The inclusion of Switzerland and other non-EU states in the EU finance ministers' deal was a stipulation for securing the approval of Luxembourg, Austria and Belgium. The Swiss arrangement, however, is still awaiting a final approval from the EU finance committee before being implemented.[278]

3.2.4 U.S. Opinion on OECD's Initiative

In May 2001, under the Bush administration, Treasury Secretary Paul O'Neill made a statement on "The OECD Tax Havens" report. An excerpt is as follows:[279]

> The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition that forces governments - like businesses - to create efficiencies. In fact, the Administration is actively working to lower tax rates for all Americans. After reducing our tax burden, we will turn our attention toward reforming our system to make it simpler and more efficient. On these principles the United States remains firm. In its current form, the project is too broad and it is not in line with this Administration's tax and economic priorities.

O'Neill made clear the U.S. would vigorously pursue genuine tax cheats and fight criminal money-laundering efforts. But he rightly saw the distinction between those

[278] Ibid.
[279] Paul O'Neill, 'Treasury Secretary O'Neill Statement on OECD Tax Havens' (Press Release, 10 May 2001).

laudable goals and the less-than-laudable efforts to force low-tax countries to impose more exactions on their citizens.[280]

While the Clinton administration in the United States strongly supported the OECD's efforts, Bush is taking a different instance. In response to the US administration's objectives to the crackdown on tax havens, the OECD softened its position in late June 2001 under a compromise with the US. First, the OECD had postponed the next publication of uncooperative tax havens till the end of November 2001. Second, sanctions would not be imposed on "listed offenders" until at least April 2003. Third, the OECD would no longer try to prevent countries from keeping their low-tax systems or prevent them from offering tax breaks to foreign investors that were not available to local residents. The compromise shifts the focus to achieving an effective exchange of information with tax havens.[281]

3.3 Tax Evasion and Money Laundering

With the FATF spearheading the combat against money laundering, countries which are concerned with maintaining themselves as lush territories for global wealth management have anti-money laundering legislation in place.

An unedited version of the relevant section of the US Criminal Code provides the following.

[280] Ibid.
[281] Szeto Allen, 'Is Tax Competition Harmful?' (2001) 134 *CA Magazine* 29.

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity; conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity:

(A)

(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code, 1986; or

(B) Knowing that the transaction is designed in whole or in part

(i) to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under state or federal law

[is gnilty of the offence of money laundering].

The US Criminal Code, itself a codifying section, provides an illuminating example of a statutory provision that illustrates how anti-money laundering legislation has evolved.

The original objective of the US Congress in enacting the first anti-money laundering legislation was to assist prosecutors in securing a conviction of persons engaged in transactions involving the proceeds of drug trafficking where there was no evidence to tie them into the original (or predicate) drugs-related crime (such as production, importation or distribution). Such persons would often, prior to specific money laundering provisions, be (unsuccessfully) indicted for offences relating to the predicate drugs-related crime itself, such as

- aiding and abetting the original drugs-related offence, or
- conspiracy with others to commit the original drugs-related offence.

It was, therefore, clearly desirable to create a separate criminal offence of laundering the profits derived from drug trafficking, in order to catch and prosecute those persons who were solely involved in the movement of money earned from the unlawful production and distribution of illicit drugs. [282]

The original objective of the legislation was then extended to encompass not just the laundering of drug-related money, but the laundering of money derived from all crime. The US Criminal Code creates a specific offence of conducting a financial transaction that involves the proceeds of "specified criminal activity". The criminal activity specified in the Code includes not only drug-related crime, but a considerable number of other serious criminal offences. This is sometimes called "all crimes" anti-money laundering legislation, referring to the fact that the aim of the legislation is to

[282] Parkinson and Howarth, *Trust Creation: Law and Practice* (2000) 82.

criminalise persons who launder the proceeds of all serious crime, rather than just a few offences or types of offence.[283]

Eigen and Del Ponte assert that the objective of modern (onshore) international anti-money laundering legislation has thus been extended further to include the movement of hot as well as of dirty money. Dirty money is basically money that is derived from crime. Hot money is derived from a civil wrong which may or may not involve traditional fraud or dishonesty but which involves conduct lacking in integrity. For instance, the money may have been earned lawfully but becomes "hot" when the owner tries to disguise or hide its provenance in order unlawfully to evade taxes or exchange controls; or, alternatively, tries to disguise its provenance to frustrate lawful claims being made against those assets in, for instance, a lawsuit brought by creditors or in divorce proceedings. Hot money can be a grey area. The money may have been earned legally but it is mixed with dirty money as a result of the export methods or investment. Tax evasion and political corruption would fall in the category of hot money, which makes up a larger percentage than dirty money.[284]

Accordingly, there is a modern extended role for anti-money laundering legislation - to combat tax evasion and other "fiscal crime". Governments in the developed high tax, industrialised (onshore) jurisdictions have realised that the same money laundering strategies implemented against drug trafficking should apply to tax evasion and fiscal crime.[285]

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[283] The two primary money laundering statutes are sections 1956 and 1957 of the U.S. Criminal Code, Title 18.

[284] Carla Del Ponte and Peter Eigen, *World Economic Forum Knowledge Navigator - Dirty or Hot Money or 'only' tax evasion?* (2000) World Economic Forum <www.weforum.org> at 10 May 2004.

[285] Parkinson and Howarth, above n 282, 83-4.

3.3.1 Eroding Bank Secrecy – Before and After September 11

The Inland Revenue Services (IRS) sent out a clear message to tax evaders. The IRS Commissioner Charles O. Rossotti said,

"If people use these illegal offshore methods to hide their income, we will find out who they are.

If taxpayers are involved in these schemes, it is time to make things right. We urge these taxpayers to consult with a reputable, trusted tax professional for advice."[286]

For those Americans that abuse tax haven structures, the storm is just beginning. Since September 11, it is becoming increasingly difficult for those non-compliant taxpayers to hide. Indeed, the US government can rely on an arsenal of disclosure initiatives, and in certain cases can compel American taxpayers to turn over foreign-based documentation and information.

Lawfully, the IRS and the US Department of Justice (DOJ), as well as other US governmental agencies, have substantial powers and authority to obtain foreign-based evidence. This is true if the foreign-based evidence is located in a tax haven jurisdiction. The US government can initiate a variety of foreign-targeted discovery requests, such as "compelled consents"[287] and "letters rogatory"[288], as well as a

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[286] Barbara T Kaplan and Patrick T O'Brien, 'Secrecy Associated with Offshore Banking is Evaporating' (2002) 119 *Banking Law Journal* 741.
[287] Doe v United States, 487 U.S. 201 (1988).
[288] 28 U.S.C. 1781 et seq. (1999). "The letter rogatory is a 'medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the

myriad of other foreign discovery devices. As Commissioner Rossotti stated, "simply put, the guarantee of secrecy associated with offshore banking is evaporating."[289]

As a direct result of the September tragedy 11, US law has been amended to enable the DOJ to more readily obtain foreign-based records – even those kept in tax haven countries. On 26 October 2001 the USA Patriot Act was signed by President Bush in part to force foreign banks with US correspondents to furnish evidence and documents regarding foreign correspondent bank accounts in both criminal and civil proceedings.[290] Further, the new law allows the DOJ to prosecute money laundering charges for many foreign criminal offences, including most foreign fiscal offences.[291]

Additionally, since September 11, the US government has entered into tax information exchange agreements (TIEAs) with the Bahamas, the Cayman Islands, Antigua and Barbuda, Panama, and most recently the British Virgin Islands.[292] Pursuant to the terms of these agreements, the IRS will be allowed access to bank account information that was previously protected by bank secrecy laws, as well as beneficial ownership information relating to foreign corporations and trusts.[293] These

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administration of justice in the former country.'" Mark L Gyandoh, 'Foreign Evidence Gathering: What Obstacles Stand in the Way of Justice' (2001) 15 *Temple International & Comparative Law Journal* 84-5.

289 David Cay Johnston, 'IRS Says Offshore Tax Evasion is Widespread', *The N.Y. Times* (New York) 26 March 2002, at A1.

290 Patti Mohr, 'President Bush Signs Extensive Money Laundering, Anti-Terrorism Bill' (2001) 5 November *Tax Notes International* 582. See also Bruce Zagaris, 'TIEAs and the Case for Caribbean Tax and Investment Incentives' (2002) 4 March *Tax Notes International* 983.

291 USA Patriot Act of 2001, section 315.

292 Kevin A Bell, 'U.S., British Virgin Islands Sign Tax Information Exchange Agreement' (2002) 15 April *Tax Notes International* 123.

293 See Article 5, Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, for the Exchange of Information Relating to Taxes (signed 27 November 2001)

agreements will become effective beginning in 2004 for criminal tax matters and 2006 for civil tax matters.[294]

The IRS has targeted US citizens and residents with unreported foreign bank and securities accounts held individually or through trusts and companies organised in tax haven jurisdictions. [295] The IRS also has targeted US and foreign business organisations that promote and solicit US citizens and residents to operate offshore structures, typically in tax havens.[296] These promoters usually advocate offshore schemes that illegally avoid or evade taxes and simply do not legally achieve the promised US tax savings.[297]

The USA PATRIOT[298] Act

The thrust of money laundering laws was directed to that of it being a tool to combat terrorism when the "September 11 attacks" resulted in the collapse of the Twin Towers in United States in 2001. On September 14, 2001, the Department of Treasury created the Foreign Terrorist Asset Tracking Centre within the Office of Foreign Assets Control[299] to act as a focal point to track, trace, and seize terrorist funds. On

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[294] See Article 12, Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the British Virgin Islands, for the Exchange of Information Relating to Taxes (signed 3 April 2002)
[295] See Bloomberg News, "IRS to Seek Visa Cards Data", *The N.Y. Times*, (New York) 30 March 2002, at C2.
[296] See IRS Notice 97-24, 1997-1 C.B. 409, "Certain Trust Arrangements". See also "Summary of Abusive Trust Schemes", www.ustreas.gov, United States Department of the Treasury.
[297] William M Sharp, Sr, William T Harrison III, and Scott A Harty, 'Post-11 September Use of Offshore Tax Havens: The Dos and Don'ts' (2002) 26 *Tax Notes International* 353-4.
[298] The full title of the act is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001".
[299] The function of the Office of Foreign Assets Control is to enforce economic and trade sanctions, impose restrictions on the transactions, and freeze assets based on the foreign policy initiatives and foreign policy goals of the United States against targeted foreign countries, terrorist organizations, and those groups engaged in narcotics trafficking. Its authority derives from Presidential wartime and

September 23, 2001, the President issued Executive Order 13224, which directed the Secretary of the Treasury to freeze all assets, and to take all steps necessary, to prohibit financial transactions with individuals and organisations listed in the order and this list has been updated several times. On September 28, 2001, the United Nations Security Council unanimously passed a United States sponsored resolution that called on all United Nations member states to freeze the assets of suspected terrorists in their respective countries and to take all steps necessary to disrupt the financial support flowing to these suspected terrorists and their organisations. In broad terms, Treasury Under Secretary Jimmy Gurule outlined the various lines of financial attack being pursued by the United States as follows:[300]

1. Closer scrutiny of the financial activities of terrorist organisations and their supporters;
2. The identification and blocking of assets of terrorist organisations and their supporters;
3. Detailed study of the methods used by terrorists to finance their activities;
4. The implementation of measures to give additional leverage to existing laws to disrupt the financing of terrorism and to break apart terrorist organisations;
5. The identification of gaps in existing laws that terrorists may exploit and the implementation of measures to remedy these deficiencies; and
6. The promotion of closer co-operation among law enforcement and regulatory agencies both within the United States and with their counterparts in other countries.

national emergency powers as well as the authority granted to it by specific legislation. For more see www.ustreas.gov/ofac.

[300] Hinterseer, above n 249, 405.

The USA Patriot Act, containing more than 300 pages of new rules for combating money laundering and terrorist use of the U.S. financial system, was signed into law October 26, 2001. Effective April 24, 2002, Section 352 of the law required all U.S. financial institutions to implement a comprehensive anti-money laundering policies and procedures program. While some of the new provisions have received a great deal of media attention, many bankers remain unaware of the provisions relating to money laundering. Anti-money laundering regulations, including compliance with the Bank Secrecy Act (BSA) and Office of Foreign Asset Control (OFAC) requirements, have always been a high priority with regulators. However, in the wake of the terrorist attacks of September 11, 2001, enforcement of these regulations was increased, changes to the OFAC lists came more rapidly, and new laws were enacted to increase the responsibilities of financial institutions in preventing the use of the U.S. financial system for money laundering and terrorist funding. As a result, the risks of non-compliance with the anti-money laundering requirements and the risks of not having an effective anti-money laundering program have increased dramatically.[301]

3.3.2 Foreign Tax Evasion and Money Laundering

Of particular interest to the offshore banking, trust and financial services industry is the issue of international (or foreign) tax evasion and its relationship to all crimes anti-money laundering legislation.

In the case of *Planche v Fletcher*, it was noted that "no country takes notice of the revenue laws of another". In the leading English case of *Government of India v*

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[301] Kenneth W Proctor, *USA Patriot Act and Anti-Money Laundering* (2003) Brintech Inc <http://www.brintech.com> at 10 July 2004.

Taylor[302] it was confirmed that the English courts will not entertain any action brought in England to collect taxes owed to a foreign state.

The principle that a common law jurisdiction will not allow an action to be brought in the courts by a foreign state to collect taxes owed to that foreign state is based upon the fact that each country or state is sovereign, i.e. independent. It is left to individual governments to determine with whom they wish to enter into treaties in order to assist each other in collecting taxes.[303]

The above principle represents the starting point of this analysis, as it illustrates the extent of co-operation between nations in respect of the collection of foreign tax. Basically there is no co-operation unless a specific tax treaty has been signed. However, the criminal law in a number of jurisdictions as evidenced by the number of Tax Information Exchange Agreements (TIEAs) signed, has moved a long way from this rather parochial approach, towards a global responsibility. The rationale behind this movement is clear from the OECD point of view. The OECD members who represent the industrial and developed high tax jurisdictions of the world are very concerned about the amount of revenue being lost through international tax competition and arbitration. The argument calls for anti-money laundering systems to be utilised in the fight against tax-related crime.

Hence, the USA's "all crimes" anti-money laundering legislation requires the financial sector to assist combat not only the suspected laundering of money derived from criminal conduct per se, but also money derived from tax evasion. For instance:

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302 *Government India v Taylor* [1955] AC 491, [1955] 1 All ER 292
303 Parkinson and Howarth, above n 285, 85-9.

- Know Your Client ("KYC") procedures involve institutions obtaining basic information concerning each customer's tax position
- transactions that appear unusual or that, by their very nature, appear to facilitate an unlawful evasion of tax should be investigated by the institution
- suspicion of domestic tax evasion should be reported to the appropriate money laundering investigative body (the statutory duty imposed upon an institution to report suspected tax evasion overrides the contractual duty of confidentiality)
- the money laundering authority will generally have power to share the information it receives with other agencies, such as the revenue authorities. [304]

3.3.3 OFCs under No Obligation to Assist in Fiscal Matters

The legality or otherwise of tax planning, though important, is of itself insufficient to demand that confidentiality be preserved in relation to tax information. While some may be uncomfortable with the argument that offshore states are under no obligation to assist onshore states in increasing onshore coffers though tax collection offshore, there is firm legal precedent for this. Even without the particular context of offshore business, the international law has always recognised that the fiscal and penal matters of one state with respect to enforcement of foreign judgements and other types of

[304] Ibid.

international assistance should be outside the realm of another.[305] This rule has been followed rigorously in OFCs.[306] It is also consistent with the rule on the legality of tax avoidance measures which refrain from imposing a duty on individual voluntarily to assist tax authorities in gaining revenue.

For example, in *Stutts v Premier Benefit Capital Trust*,[307] a receiver appointed in the United States applied for recognition in the Cayman Islands. The applicant was the receiver of the respondent trust which was registered in the Cayman Islands but conducted its business primarily in Florida. The complaint against the trust was that it had made sales of unregistered securities and had engaged in a scheme to defraud investors. The court followed the rule closely:[308]

> The rule that the courts of no country execute the law of another applies not only to ... crimes ... but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue ... and to all judgements for such penalties.

Consequently, the application failed. Again, in *Re Lambert and Pinto*[309], the rule of non-enforcement was considered by the Supreme Court of The Bahamas, applying to what it described as a 'principle of international acceptance' in the interest of 'public

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[305] This is illustrated in the cases of *Government India v Taylor* [1955] AC 491, [1955] 1 All ER 292 and *A-G (New Zealand) v Ortiz* [1984] AC 1, [1983] 2 All ER 93, 'We do not sit to collect taxes for another country or to inflict punishments for it.', Ortiz [1984] AC 1, 20, per Lord Denning

[306] According to the Articles of the Draft Declaration on Rights and Duties of States (1949) by The International Law Commission of the UN. Article 3: Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

[307] [1992-93] CILR 605. See also *Clapham v Mesurier* [1990-91] JLR 5., where the Jersey courts found it had no power to enforce in Jersey a claim by the Inland Revenue for taxes in respect of UK legislation, even if such constituted an indirect claim.

[308] Stutts, 610. Relying on *Wisconsin v Pelican Insurance Co* [1893] AC 157

[309] Sup Ct, Bahamas, Case No. 962 of 1986, per Strachan J.

policy'.[310] The court rejected the narrow view of the rule that it only applies where there is an attempt to enforce revenue or penal laws directly. It held that the rule applies equally to attempts at indirect enforcement: in this case, a request for information to assist in the collection of taxes.[311]

In fact, the enforcement of such laws may require the offshore jurisdiction to assist in the administration of justice and to that extent it is an infringement of sovereignty.[312] On the same principles, offshore courts may refuse to enforce revenue laws which seek to expand the territorial jurisdiction of a country to tax its residents and citizens where the relevant assets are located offshore.[313]

3.4 Mentality towards Money Laundering

The success of the campaign against money laundering hinges on changing the social attitudes that tend to diminish or neutralise the stigma associated with white-collar crime. In particular, two social norms are in a state of flux. The first of these concerns changing moral perceptions about what constitutes immoral conduct within the financial markets. This point of view by Stanley, argues that this transformation has been dramatic. '[It] is a critique suggesting that the terminology associated with regulatory discourse neutralises "fundamental" values and suggests a version of ethical indeterminacy.'[314] Within the financial markets, the rise of the so called "greed is good" mentality has narrowed the range of activities considered to be illegal.

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[310] *Re Lambert and Pinto*, p. 16, borrowing the words of Lord Somervell in *Government of India v Taylor* [1955] 1 AC 491.
[311] *Re Lambert and Pinto*, p. 17
[312] *Re the Matter of H* [1996] CILR 237 at 243.
[313] Such as those from the US.
[314] Christopher Stanley, 'Speculation on the Conflict of Discourse: Finance, Crime and Regulation' (1996) 4 *Journal of Financial Regulation and Compliance* 242.

Meanwhile, changes in market operations, catalysed by changes in information technology, have meant that money as a concept has become a "free-floating signifier" devoid of real value: money emerges out of, and disappears into, thin air as numbers appear and disappear on a computer screen. What has not changed, however, has been attempts to control how the markets operate through highly complex and technical regulations. By their very nature, these regulations mean that violations tend to be viewed as mere infractions and not as serious anti-social behaviour worthy of condemnation through the criminal law. Four factors have reinforced this trend:[315]

1) Practices that society would label "criminal", escape this label in financial markets because they either represent customary practice or they have not yet been subjected to regulation;
2) Criminal activity usually requires the identification of a victim, which is often difficult in respect of crimes committed within the financial markets;
3) Policing techniques and methodologies, while improving, tend to be inadequate so that the prosecution of an offence remains relatively rare; and
4) The transgression or circumvention of regulations may become a pleasure or desire in itself.

Hence it is argued by Stanley that, 'The investigation of criminality in financial markets travels under a number of asinine labels and the activity of the criminal becomes sanitised and neutralised because of this labelling.'[316] Concepts such as client, consumer, and victim, the traditional reference points used to define the concepts of good and bad, right and wrong, have dropped out of popular discourse to

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[315] Hinterseer, above n 300, 28-9.
[316] Stanley, above n 314, 250.

be replaced by the terms risk, enterprise, and profit. The net effect has been for the rules and regulations that operate within the financial markets to now been seen as obstacles to be evaded as opposed to safeguards that require compliance. Therefore the argument maintains that, 'Penalty for a transgression becomes an occupational risk and not subject to the discourse of criminality.'[317] This point of view thus accepts that, to transgress and circumvent regulations is therefore increasingly acceptable.

Secondly, in the context of money laundering, ethical indeterminacy has contributed to the emergence among white-collar workers of a professional class of workers specialising in the financing of unlawful activity through the intermediation of money laundering services.[318] This class comprises bankers, lawyers, accountants, and other professionals who help facilitate crime by assisting in the development, implementation, and the execution of money laundering strategies. Their work has been made easier by the very way in which money operates as a medium of exchange: money eliminates the need for barter by acting as a common commodity into which goods and services can be transformed in order to purchase other goods and services. What this transposition serves to accomplish in the money laundering context is to obscure the nefarious activity associated with the underlying crime, as the money is "visible" but not the violence or other activity with which the criminally derived funds are associated. Meanwhile, the same financial, legal and accounting instruments used to launder money are also used for legal and legitimate purposes in the formal economy. What this means is that white-collar professionals may find it relatively easy to create and use instruments that they regularly use in a legal and legitimate context, but in the occasional illegal and illegitimate context. This transition from the

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[317] Ibid 249.

[318] Rowan Bosworth-Davies, 'Deviant Legitimacy – A Theory of Financial Crime' (1996) 4 *Journal of Financial Crime* 139.

formal to the informal economy is made all the easier by the fact that the practical context in which such instruments are being used may be neither clearly legal nor illegal.[319]

3.5 The Influence of Soft Law

The term 'soft law', as cited previously, refers to the lack of justiciability of the instruments in which the rules are enshrined, rather than to the content of the rules themselves. An important factor which explains the role of soft law in the fight against money laundering is the aversion to government interference that financial institutions have often displayed. In some countries, money laundering was initially fought, not through legislative measures, but via codes of conduct or by regulatory measures issued by banking supervisors. The content of a number of initiatives to curb money laundering was thus highly influenced by the financial sector itself.[320]

Given the absence of a formal international legislator, it is not surprising that the influence of soft law has been especially notable on the international level.[321] The contribution of international soft law instruments to the fight against money laundering is impressive. One of the earliest international initiatives undertaken in the field of money laundering was the Recommendation No.R(80)10 adopted by the Committee of Ministers of the Council of Europe on 27 June 1980 entitled *Measures against the transfer and safeguarding of the funds of criminal origin.*[322]

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319 Hinterseer, above n 315, 28-9.
320 Stessens, above n 25, 15.
321 UN Economic and Social Council, Commission on Crime Prevention and Criminal Justice, "Review of Priority Themes, Control of Proceeds of Crime – Report of the Secretary-General, E/CN.15/1993, Vienna, 13-23 April 1993, p. 14".
322 Stessens, above n 320, 16-7.

The crown jewel of soft law, however, is the set of the forty recommendations issued by the FATF on money laundering in 1990. The recommendations are no more and no less than recommendations: non-binding soft law. It was a deliberate choice not to cast the recommendations into the mould of a treaty. This was to avoid elaborate ratification procedures and to allow the flexible adaptation of the recommendations, as was done in 1996. Flexibility was also the motive behind the loose structure of the FATF. [323]

3.6 Broad Application Field of Anti-Money Laundering Legislation versus the Legality Principle

According to Dressler, there are three doctrines that balance the roles of the courts and legislatures in making criminal law:[324]

1. The principle of legality says that courts should not create new crimes.

2. The doctrine of void-for-vagueness says that legislatures have to explain what they mean and not leave all the work up to the courts.

3. The rule of strict construction says that if a criminal law is uncertain, it should be decided with a slant toward the defendant.

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[323] Ibid 17-8.
[324] Joshua Dressler, *Cases and Materials on Criminal Law*, (3rd ed, 2003)

From a law enforcement point of view, the broad character of anti-money laundering legislation is necessary in order to be able to respond to the varied and shifting nature of the phenomenon of money laundering. From the defendant's viewpoint, however, the broad character of the legislation may be viewed as problematic in that the type of conduct that is prohibited may be unclear or vague. This allegedly vague character could be invoked to challenge anti-money laundering legislation as violating the legality principle. The principle not only imposes a ban on the retroactive introduction of legislation but also implies a qualitative requirement: the law should be sufficiently clear and precise that citizens can know beforehand what type of conduct is considered criminal.

This requirement of foreseeability can be found in the case law of the European Court of Human Rights relating to Article 7 of the European Convention on Human Rights.[325] Although any judgement in this matter always depends of course on the wording of the domestic law, it is questionable whether the anti-money laundering legislation can be held to violate the legality principle on the ground that it does not 'provide effective safeguards against arbitrary prosecution, conviction and punishment'.[326] As an example, the Swiss Supreme Court has ruled that Swiss anti-money laundering legislation does not violate the legality principle, as it allows citizens to assess the consequences of their actions.[327] The mere fact that a very substantial number of economic activities may be construed as transgressing the law does in itself not constitute a breach of the legality principle: the clarity of a definition of an offence should not be confused with narrowness. The same can be said in

[325] European Court of Human Rights, judgment of 22 November 1995, SW v. United Kingdom, Series-A, No. 335-A, para 34-6.
[326] Ibid, para 34.
[327] ATF 119 IV 242.

respect of the fact that – at least under some domestic legislation – the laundering of the proceeds of any criminal activity is regarded as criminal, which considerably widens the application field of a law which is in the first place directed towards third persons not involved in the predicate offence.[328]

3.7 The Regulatory Challenge

It has been observed by Kapstein that, 'In some respects it is ironic that banking is characterised as a global industry, for no sector of the economy is so heavily regulated by domestic authorities.'[329] Money launderers have the ability to simultaneously operate in several different markets and countries. Regulators, meanwhile, have jurisdiction over a set number of markets within a defined geographical area or state. Criminal entrepreneurs can wire money by taking advantage of OFCs secrecy laws at speeds limited only by the ability to communicate information from one place to another. Regulators, however, can move only as fast as permitted by their bureaucratic and administrative machinery and may therefore not be able to breach these countries' secrecy laws for years.

Technological innovation has created new opportunities for not only entrepreneurs[330], but also money launderers as it has helped to catalyse the globalisation and financial markets integration processes and consequently has expanded the scope, complexity,

[328] Stessens, above n 322, 126-8.
[329] Ethan Kapstein, *Governing the Global Economy: International Finance and the State* (1996) 17.
[330] Part of the regulatory challenge is illustrated by the minor financial crisis that involves Sussex Futures, a derivatives trading specialist. On August 10, 1999, the Financial Services Authority in London had to intervene in the company's affairs because on August 6, 1999, one of the company's traders incurred losses of £750,000 in less than 30 minutes of trading. The incident illustrates the liquidity in the contemporary financial markets and how fast traders can get into both positive and negative trading positions. Vincent Boland, "Trading in UK Gilts under Scrutiny", *Financial Times*, 10 August 1999.

and rate at which financial transactions can be conducted. For money launderers, improvements in technology have made it easier for them to quickly and cheaply move financial assets around regulatory obstacles, to divert their movement through various secrecy jurisdictions, and to shuffle legal title among a number of different legal entities. The net effect has been to make it more difficult to for regulators not only to track the flow of laundered money, but also to identify when, in the first place, a crime has been committed. Of course, the problems for regulators, reach far beyond the unlawful activities of individuals, as technological innovation has fundamentally transformed the very nature of the financial markets.

Associated with the processes of globalisation and integration within the financial markets has been the process of deregulation. As a process, deregulation has broken down the barriers that have traditionally separated commercial from investment banking activities and led to the formation of financial conglomerates that engage in both. As a side effect to the deregulatory process the intermediation function traditionally performed by banks is now being performed by a broader range of financial institutions like pension funds, mutual funds, and insurance companies. In turn, each such institution has its own unique characteristics to which regulators must respond.[331]

As in the case of international tax competition, the allocative effects of international tax arbitrage depend on the degree of substitutability—specifically, in the latter context, the substitutability of transactional forms (tax considerations aside). Some of

[331] Hinterseer, above n 319, 332-5.

the tax-avoidance literature [332] identifies two broad categories of substitutable transactions noted earlier in the context of tax competition. Again, the policy relevance of the distinction between the categories lies principally in the different efficiency effects. The first category consists of those transactions that are perfect or nearly perfect substitutes in the sense that any differences in non-tax considerations are non-existent or minimal. More particularly, instances of perfect substitutability arise where equivalent cash flows associated with substitutable transactional forms are taxed inconsistently, so that repackaging lowers the associated tax burden without sacrificing the desired pattern of cash flows. Where two transactions of this type are taxed differently, the lower-taxed form may be chosen over the higher-taxed form with little or no sacrifice of non-tax attributes. These instances of "pure" tax avoidance typically involve "purely paper transactions"[333] that attempt to arbitrage differences in tax treatment without altering the desired pattern of cash flows associated with a particular transaction.[334]

Thus the number of participants within the financial markets increases, competition among participants has intensified. Financial institutions have expanded overseas to diversify their sources of income and to increase the scale and efficiency of their operations. In particular, financial institutions have sought to develop value-added products and services on which greater fees and commissions can be earned. They have also sought to offer these products and services within a greater range of countries and to a wider range of clients in order to create a more robust revenue

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[332] See, for example, Michael Brooks and John Head, "Tax Avoidance: In Economics, Law and Public Choice," in Graeme S. Cooper, ed., *Tax Avoidance and the Rule of Law* (1997), 53-91. See also Joseph E Stiglitz, "The General Theory of Tax Avoidance" (1985) 38 *National Tax Journal* 325-37; and Myron S Scholes, Mark A Wolfson, Merle Erickson, Edward L Maydew, and Terry Shevlin, *Taxes and Business Strategy: A Planning Approach*, (2nd ed, 2002).
[333] Brooks and Head, above n 332, 65.
[334] Edgar, above n 270, 1103.

streams. At the same time, regulatory arbitrage, especially through OFCs, has been used to minimise capital costs by structuring and executing transactions through jurisdictions that have more relaxed reserve and regulatory requirements. Invariably, however, these flexible regulatory jurisdictions also have domestic laws that support financial secrecy, which complicates supervision of financial institutions.[335]

3.8 Tax Competition and Money Laundering

Tax systems need to cope with increasingly mobile tax bases internationally. Advances in communication technologies, ongoing developments in complex, innovative financial instruments, and the expansion of tax havens and preferential "niche" regimes designed to attract mobile capital, particularly financial capital, are creating horizontal inequities between taxpayers and producing a misallocation of capital. Governments may find themselves competing for these mobile activities, but this is different from the sort of tax competition over generally applied tax rates that has been the subject of the economics literature.[336] One point of view is that, tax competition can be beneficial, both by restricting tendencies towards excessive government spending and by providing individuals with a choice between locations according to their desired level of public provision. In the absence of tax competition, tax levels would be set optimally.[337] In effect, this model challenges the proposition that tax levels would necessarily be calibrated to maximize the welfare of residents or factors of production in the presence of an incentive for public officials to increase the

335 Hinterseer, above n 331, 335.
336 Alexander Haupt and Wolfgang Peters, *Restricting Preferential Tax Regimes to Avoid Harmful Tax Competition* (2004) Institutional Design of Federal Systems: Theory and Empirical Evidence (SPP 1142) <http://www.zei.de/federalism/index.html> at 10 July 2004.
337 Michael Keen, 'Preferential Regimes Can Make Tax Competition Less Harmful' (2001) 54 *National Tax Journal* 757-62.

size of the public sector. Tax competition is considered to act as a constraint on such self-interested behaviour and thus is seen as efficiency enhancing. Ideally, tax levels should be driven down to the point at which the marginal cost equals the marginal benefit to taxpayers.[338] However, this reasoning does not hold for tax competition that is non-transparent or discriminatory, or where it facilitates illegal tax abuses that enable companies or individuals to reduce their tax liability without actually moving their residence away from a jurisdiction with high public provision.[339]

The OECD makes a useful distinction between tax competition in the form of generally applicable lower tax rates and tax regimes designed to attract foreign investors. Restricting tax competition should not and cannot mean that voters in democratic countries lose their right to determine the size of the public sector through general tax increases or reductions. But it does mean that countries should not provide windfalls for foreign investors at the expense of the ability of other countries to provide those public services which their residents desire. Such limitations are particularly appropriate because those foreign investors themselves often reside in countries providing a high level of public services and yet refuse to pay the tax price that providing such services entails.

The view that depending on the OECD for solving the tax competition problem suffers from one major drawback: Developing countries are left out and may perceive the OECD as a cartel of rich countries operating at their expense. But it is unlikely that general tax competition benefits developing countries, who need the tax revenues they give up to attract foreign investors. If all developing countries could be prevented

[338] Edgar, above n 334, 1107.
[339] "Tax and the Economy: A Comparative Assessment of OECD Countries", Tax Policy Studies No. 6, Organisation for Economic Co-operation and Development, 2001, p.21

from competing in this fashion, they all could gain. In the longer run, it is considered that, the need for global standards and the fight against harmful tax competition could become part of the World Trade Organization's agenda, or even require a new "world tax organization," in which developing countries are adequately represented.[340] It is believed that this would also solve the problem of what to do about the 15 percent of multinationals who are not headquartered in OECD member countries, a percentage that can be expected to grow if the OECD indeed moves to restrict tax competition for its multinationals.[341]

The facilitating role played by OFCs in money laundering may be overstated. Blum, Levi, Naylor and Williams make the point in their study on OFCs prepared for the United Nations that "Money laundering can proceed very easily without bank secrecy; in fact, it may well be that launderers avoid it precisely because it acts as a red flag."[342] In fact what may be more problematic are corporate secrecy laws and other obstacles that exist alongside bank secrecy laws, as these act as an associated set of confidentiality provisions. After all, to pierce bank secrecy laws in order to identify a company based in an OFC being used to launder money is of little help if the individuals who stand behind that company cannot be identified.[343] In their words:[344]

> It is not that most haven countries seek drug money or any other type of assets derived from serious crime. Rather they literally cannot afford to co-operate

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[340] Vito Tanzi, 'Is There a Need for a World Tax Organization?' in A Razin and E Sadka (eds), *The Economics of Globalization: Policy Perspectives From Public Economist* (1999)
[341] Reuven S Avi-Yonah, 'World-Class Tax Evasion' (2000) 11 *The American Prospect.*
[342] Jack Blum, Michael Levi, Thomas Naylor, and Phil Williams, "Financial Havens, Banking Secrecy and Money Laundering", A Study Prepared on Behalf of the United Nations Office for Drug Control and Crime Prevention Under the Auspices of the Global Programme Against Money Laundering, www.imolin.org, 1998, p. 27.
[343] Ibid.
[344] Ibid 28.

too closely. … It is popular to decry the operation of such financial havens, and it is certainly true that they can have a harmful effect, particularly in terms of facilitating tax evasion and secondarily as places that foster money laundering. It is however necessary to show some understanding of their positions, their economic vulnerability and their lack of alternative resources. In the field of drug control, the major consuming countries are willing to research and finance alternative development programmes for producing countries. Therefore, it should be possible to imagine alternative economic development solutions for such financial havens, developed in conjunction with the world business community.

Certainly, the developed countries, along with all other countries that are keen to ensure that the global economic system operates in a manner whereby abusive financial practices are minimised, have legitimate concerns about the questionable activities facilitated by OFCs. These concerns are all the more important to address given the contemporary interconnectedness of the financial markets and the problem can be spread quickly throughout the financial system. Certainly, without international organisations like the FATF, OECD, and FSF to push reform, the policies facilitated by OFCs would tend to proliferate rather than be curtailed. From an OFC perspective, however, the crux of the problem is that the financial services industry is an industry that can be mobilised in support of sustainable development. In particular, financial services are a growth industry, a skilled industry, an industry that supports the transfer of skills and technology, and an industry that is not premised on the exploitation of the environment. In this respect, further comments by Oxfam are of note:[345]

> Widespread concern about the offshore problem has given rise to a number of international initiatives. ... These initiatives are useful up to a point, but they primarily reflect the concerns of Northern governments. They lack a development perspective and can also be accused of being unbalanced. The issue of financial havens goes beyond the 'offshore' activity of small island states to 'onshore' activity in major economics such as the City of London and New York.

Consequently, Oxfam advocates an integrated global approach. Such an approach would help to address the "unfreedoms" discussed by Amartya Sen[346] and would involve the provision of technical and other assistance to help OFCs diversify away from dependence on financial services, especially secrecy services. The FATF, FSF, and OECD have recognised the need for such assistance. The important point is that to address the issues posed by OFCs, development issues such as training, resourcing and technology, need to be taken into account.[347]

Alldridge asserts that the events of 11 September 2001 provided the impetus for a further shift in the focus of money laundering control to consider the means by which terrorism is financed. The expression 'laundering' was continually applied to the

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345 Oxfam, above n 1, 2.

346 Amartya Sen, a Nobel Laureate in economics has stated economic development to be abont the removal of "unfreedoms", which includes the unfreedoms associated with tyranny, poverty, corruption, and other obstacles that contribute to social deprivation. Amartya Sen, *Development as Freedom* (2001) 3.

347 Hinterseer, above n 335, 232-3.

means by which terrorist organisations were financed. The use of the pejorative expression was doubtless deliberate. The analytical truth is that funding for terrorism is either itself from the profits of crime, in which case it is covered already, or it is not, in which case the seizure of money intended for terrorist use, when no action has been taken towards its deployment, smacks of 'thought-crime' and does not fall within traditionally accepted notions of laundering, because the money is clear in the first place. Similarly, the introduction of closer monitoring of suspected bank accounts by financial information orders had already heen put in place, so far as concerns the accounts of persons suspected of involvement in terrorism. Somehow, however, the more widespread introduction of these laws was presented as being a necessary response to the attacks.[348] In this case the legislation probably would have occurred anyway, and the attacks simply provided a convenient issue by reference to which to overcome any opposition on civil liberties grounds.[349]

3.9 Conclusion

In this chapter, the issues of tax competition, tax arbitrage and money laundering were examined as two of the policy drivers of the OECD, FATF and FSF. Tax evasion and money laundering law as a problematic issue, is a creature and has become the motor of international co-operation in financial surveillance. The development of money laundering law has been driven by international organisations, and it has blurred or removed many distinctions that previously were considered sacred. Banking secrecy has been broken down and far greater international co-operation put in place. The US has been one of the driving forces behind many of the initiatives in the

[348] 'G7 approves plan to choke terror funds', *The Guardian*, 26 September 2001
[349] Alldridge, above n 260, 23.

internationalisation of criminal law.[350] The denial of certification involves foreign assistance sanctions and a mandatory US vote against multilateral development bank loans.[351] The US holds greater sway at the OECD, the World Bank and the IMF than at the United Nations: developments in international efforts against laundering which come from the former are more likely to bear a US imprimatur than those from the latter. The principal moving forces have been the IMF, the World Bank, and, in particular, the FATF. Because of its jurisdiction over markets, the European Union has been a central player. Money Laundering law is a microcosm within which the reconfiguration of national sovereignty and criminal justice is taking place.[352]

On a legislative level, international harmonisation of anti-money laundering legislation is an absolute prerequisite for success in the fight against money laundering. This holds not only for criminal legislation, but also in the context of preventive legislation, where the argument for effectiveness is reinforced by an economic argument, namely the desirability of imposing the same type of anti-money laundering measures on financial institutions in different countries with a view to an international levelling of the playing field. [353] On an operational level, the globalisation of money laundering makes it necessary to establish effective international co-operation mechanisms which allow national authorities to co-operate in the prevention and prosecution of money laundering and in international 'proceeds-

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[350] For example, corruption, as to which see Peter Alldridge, 'Reforming the Criminal Law of Corruption' (2001) 11 *Criminal Law Forum* 287.

[351] Jimmy Gurulé, 'The 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances – a ten year perspective: is international co-operation merely illusory' (1988) 22(74) *Fordham International Law Journal* 87

[352] Alldridge, above n 349, 107

[353] United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Review of Priority Themes, Control of Proceeds of Crime-Report of the Secretary-General, Vienna, E/CN.15/1993, 13-23 April 1993, p. 18.

hunting'.[354] At the heart of the matter lies the issue of sovereignty. While this concept undeniably allows every state to draft its legislation according to its own will, it might also be argued that a corollary of this concept is that no state should assist citizens of another state in the violation of the laws of their home countries.[355]

On the assumption that broad international coordination of corporate income tax systems is not feasible, or even desirable, in the short to the medium term, the obvious policy inquiry is the consideration of more limited forms of coordination that could be adopted as a response to international tax competition and international tax arbitrage. Such responses should be target-efficient in the sense that they address the defined policy problem presented by these two processes. It is argued in this section that the OECD and EU proposals to address international tax competition, as well as some proposals in the literature, can be criticised as over-inclusive, both in their definition of the policy problem presented by this process and in the proposed responses to the perceived problem. In contrast, the limited responses to international tax arbitrage that have been adopted to date are generally under-inclusive in each of these two respects.

In suggesting possible responses to international tax competition and international tax arbitrage, it is accepted that the conditions do not exist for radical reform of the current allocation of taxing jurisdiction and the division of revenue from cross-border transactions. Indeed, it is not clear that the status quo needs to be disturbed to any

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[354] M. Cherif Bassiouni and David S. Gualtieri, "International and National Responses to the Globalisation of Money Laundering", *Responding to Money Laundering: International Perspectives*, ed. Ernesto U. Savona, (1997) 109.
[355] Stessens, above n 328, 94-5.

significant extent, at least in the development of an effective response to international tax competition and international tax arbitrage.[356]

An element of the status quo is the role of low-tax jurisdictions as facilitators of tax-driven choices of investment location and the transactional form for such investment. As described in the existing literature, these jurisdictions may be either tax havens offering a general low-tax environment or jurisdictions that have a high-tax environment hut offer low-tax treatment for selected investments. Commentators have consistently recognized the need to block access to these low-tax jurisdictions. To date, that goal has been pursued through a combination of the application of CFC regimes, thin capitalization regimes, and anti-avoidance rules and doctrines found in domestic law and tax treaties.[357]

The challenges brought about by the supranational directives in regards to tax competition and money laundering have been analysed in this chapter in the global perspective and which now lead on to the shift in focus to the current issues of confidentiality and exchange of information between independent sovereign states including the OFCs.

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356 Edgar, above n 338, 1133.

357 See, generally, International Fiscal Association, *Limits on the Use of Low-Tax Regimes by Multinational Businesses: Current Measures and Emerging Trends, Cahiers de droit fiscal international*, vol. 86b (2001).

Chapter 4: Offshore Confidentiality and Exchange of Information

4.1 Introduction

Chapter 3 analysed the regulatory and soft law response to the increase in harmful tax competition and money laundering. It addressed harmful tax practices and money laundering. This chapter focuses on the corollary issues of confidentiality and exchange of information and how OFCs are expected to respond.

Confidentiality is an important common denominator in all of the various subjects of offshore law. Yet it has become an important subject of its own, grounded in a body of unique legal principles. Indeed, so frequent has been litigation on confidentiality in offshore law, that a definable body of jurisprudence now exists. Its intricate parameters and limits may be identified through case law, legislation, treaties, and statements of public policy.

This chapter analyses the challenges to confidentiality which reflect the transnational nature of offshore banking. Accordingly, mutual legal assistance, worldwide restraint orders and the tensions posed by conflicting national interests, particularly when assessed in the light of comity. Not far from that, is the issue of sovereignty and issues of private international law.

Confidentiality in OFCs operates within a new paradigm. Disclosure initiatives, anti-money laundering regulations, emerging rules on the enforcement of foreign tax laws, tax-avoidance and now issues of terrorism have forced reforms to the law of confidentiality. Thus, the international and public policy issues which seek to erode and undermine confidentiality in offshore jurisdictions arc analysed. So too are the areas of the FATF's concerns on money laundering and the OECD's allegation of 'unfair tax competition' raised in Chapter Two.[358]

Both organisations have produccd 'blacklists'[359] of uncooperative jurisdictions in their efforts to secure commitments. A raft of anti-money laundering statutes and practitioner guidance regulations have come into force. This requires clients purchasing offshore companies to provide sufficient information for verification of the identity, source of funds and nature of business to satisfy due diligence and know your client (KYC) requirements.[360]

Onshore courts such as that of US and UK, often display hostility to the efforts of offshore courts (such as the Bahamas and Cook Islands) to protect confidentiality.[361] On

[358] Antoine, above n 265, vii.
[359] The blacklists can be found in FATF's *Annual Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2003) between 2001 and 2003, four reviews have been produced thus far. OECD's 'Harmful Tax Practice' project hegan with the report *Harmful Tax Competition: An Emerging Globol Issue* (1998 OECD) where recommendations were made to reduce harmful tax competition. In the years 2000, 2001 and 2004, progress reports were made, listing countries which did not comply to the recommendations made in the 1998 report, updating their efforts and status (by dropping them from the list sbould the countries and territories have taken steps towards eliminating harmful tax competition). The latest is the review report in 2004, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* (2004 OECD). All reports can be found on the websites of FATF and OECD.
[360] Offsbore Incorporations Limited, 'Due Diligence, Know Your Client Requirements and the Changing Face of Compliance' (2002) *Offshore Feature* <http://www.offshore-inc.com> at 3 November 2003.
[361] Referring to Federal Trade Commission v. Affordable Media, CV-S-98-669-LDG(RLH) (D. Nev. 1998)(often referred to as the "Anderson" case), the Andersons were named as eivil defendants by the FTC,

the other hand, offshore courts seem preoccupied in protecting confidentiality save in blatant cases of criminal wrongdoing. Indeed, it would appear that onshore courts are prepared to jettison well-established principles in conflict of laws to extend their reach into offshore jurisdictions. Consequently, the sovereignty of nations and their legal systems is becoming increasingly insecure.

There is concern that onshore courts and international bodies are attempting to distort the application of well-known legal rules in offshore jurisdictions in order to defeat confidentiality. For example, questions of tax, trust law and human rights are approached differently where offshore jurisdictions are involved in order to effect disclosure of financial information. Further, the respect paid to confidentiality in onshore jurisdictions as evident in blocking laws and informational privacy law contrasts greatly with the approach to confidentiality in offshore jurisdictions. Antoine asserts that it is tempting to conclude that these differences have more to do with public policy concerns rather than strict legal logic.[362]

Despite the judicial and other assaults, confidentiality in offshore law continues to be instrumental in shaping offshore finance. The claim that crime is generally protected or even dominant in offshore centres is analysed and exposed as erroneous although it is conceded that confidentiality can be abused and the limits must be set for it. Indeed, it is argued that if the integrity of confidentiality is to be maintained, it will be necessary to

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claiming the Andersons were connected with an alleged $50 million fraudulent investment scheme. In the course of the proceedings the existence of the trust surfaced and the judge ordered the Andersons to repatriate $1.3 million of trust funds to the U.S.

[362] Antoine, above n 358, viii.

define more clearly the boundary between criminal activity and merely undesirable activity (from the perspective of onshore jurisdictions), such as tax avoidance and privacy interests.[363]

What differentiated legal from illegal activity is the intention with which an act is committed. This concept lies at the heart of the *actus rea* and *mens rea* distinction made by the criminal law, and is useful to highlight a dichotomy that concerns the use of financial secrecy services. Although secrecy may be the badge of fraud and financial secrecy services may be used to shelter unlawful activity, such services are also used by businesses for legal and legitimate purposes. In other words, the same legal, financial, and accounting instruments that shield informal economic activity also contribute to the growth and evolution of the formal economy. When the use of financial secrecy services supports the pursuit of questionable business practices, when the abuse of such services creates economic hardship, and when such services support graft and corruption, in other words, when secrecy is used as a badge of fraud, action needs to be taken. However, it is argued that the regulatory apparatus imposed by the state must be able to differentiate legal use from illegal abuse of financial secrecy services in a manner that does not impose significant compliance costs and competitive disadvantage on those who provide and use such services in a legal and legitimate manner.[364]

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[363] Ibid.
[364] A view also expressed by the International Organisation of Securities Commissions. See International Organisation of Securities Commissions, *Report on Money Laundering*, www.oecd.org/fatf/IOSCO, 7 July 1998.

There is a plethora of compliance requirements being imposed by governments to control money laundering and the concern expressed by the private sector regarding the associated compliance costs.[365] These compliance requirements are considerable and have been imposed in an expanding manner on financial institutions and service providers in related industries because they are seen to be in the optimal position to ascertain whether money launderers and criminals are abusing the economic system. Financial institutions certainly recognise the need to prevent abusive financial practices. The challenge for the regulators, however, is to implement an effective, but economical prevention and detection system. In particular, Hinterseer argues that this system ought to be able to differentiate suspicions from legitimate transactions without unduly burdening financial institutions with regulatory requirements and compliance costs, and without alienating clients from their relationships with the financial institutions with whom they do business. The counterpart to this challenge is, namely the challenges associated with regulating the development and implementation of such a system from the perspective of regulatory agencies.[366]

Certain countries attach particularly great importance to the exchange of information. That is the case in particular with the United States and Canada, but also of European countries, which may base this administrative co-operation, not only on bilateral conventions, but also on directives under European Community law, or even on a multilateral convention signed within the framework of the Council of Europe. Germany,

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365 Donato Masciandro and Umberto Filotto, 'Money Laundering Regulation and Bank Compliance Costs. What Do Your Customers Know? Economics and Italian Experience' (2001) 5 *Journal of Money Laundering Control* 133-145.

366 Hinterseer, above n 347, 283-284.

Belgium, Canada, Denmark, France and the Netherlands in particular have agreed with each other on automatic exchange of information.[367]

On the other hand, Switzerland maintains a reserved attitude vis-à-vis the exchange of information on the basis of taxation conventions, limiting this to the information required for application of the conventions, except in the convention it concluded in 1996 with the United States, which allows the transmission of information needed for prevention of tax fraud offences and similar acts, without being limited by banking secrecy. However, by virtue of the domestic law authorising international legal aid, the Swiss police authorities may forward information, without being limited by professional secrecy rules, when the object of the foreign proceedings giving rise to the request for information has been characterised as tax fraud.[368]

4.2 Swiss Concept of Offshore Confidentiality

The statutory model, being the model of offshore confidentiality familiar worldwide today, was conceptualised by the Swiss. They are also responsible for the birth of the OFCs. As the Swiss model remains the archetype of the offshore financial centre, its laws will be outlined in order to examine the main features of offshore confidentiality.[369] Although Switzerland is more closely identified with banking confidentiality laws, the

[367] Brian J Arnold and Patrick Dibout, "General Report" *Cashiers De Droit Fiscal International, Volume LXXXVIb, Limits on the use of low-tax regimes by multinational businesses: current measures and emerging trends* (2001) 80.
[368] Ibid.
[369] Switzerland is still a world leader in offshore business. Europe accounts for 60% of offshore banking business, while Switzerland claims 35% of the share of offshore business on its own. Further, approximately one third of the world's private wealth is invested offshore; 'The Race for Riches' (1993) 3 *The Banker* 42.

duty of confidentiality is not confined to the banking sector. Rather, it is but one aspect of a general right to financial privacy under the Swiss Civil Code (1907 Switzerland).

Specifically, the obligation of banking confidentiality arises from three legal principles:

1. the right to personal privacy;
2. the contractual relationship between customer and banks;[370] and
3. specific statutory provisions governing banking confidentiality.[371]

In addition, penal and administrative sanctions apply to breaches of banking confidentiality. Most notably, the Swiss Banking Law, article 47 makes breach of banking confidentiality a crime.[372]

The Swiss concept of confidentiality has been imported into offshore countries. In the majority of offshore jurisdictions, the confidentiality obligation has been codified.[373] The enactment of such legislation serves to extend the obligation of confidentiality from being merely contractual to being statutory and may be enforced by both criminal and civil sanctions. In addition, third parties outside the relationship of banker and client may be liable for breaches of this duty of confidentiality. In the few offshore countries where

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370 Swiss Civil Code, Art 398. The agent is obligated, in general, to use the same care as the employee under an employment contract. Affirmed by the Swiss Federal Tribunal in 1937: 63 Arrêts du Tribunal Fédéral Swiss II 242, 16 September 1937.

371 Federal Law Relating to Banks and Saving Banks, Recueil Systématique du Droit Fédéral (amended 1934, 1991), 952 (the Swiss Banking Law), Art 47 (Official Collection of Federal Laws and Regulations 1971 at 808).

372 Ibid, Breaches of privacy under art 28 also qualify as a tort.

373 By statures as the Confidential Relationships (Preservation) Law 1979, rev'd 1999 (Cayman Islands) (CR(P)L), the Confidential Relationships Act 1985 (St Kitts), the Bank and Financial Institutions Act 1995 (Belize), Offshore Banking Act 1996 (Belize) and the International Business Companies Act 1996 (Belize), the Confidential Relationships Preservation (International Finance) Act 1996, No 17 of St Vincent and the Grenadines and the Banks and Trust Companies Regulation Act 2000 (Bahamas), recently revised from the 1980 stature.

confidentiality has not been upgraded by codification under separate confidentiality statues, such as in the British Virgin Islands, St Lucia and Barbados, it should still be viewed differently from its pedigree. This is because in an offshore financial context, as a legal principle or policy, confidentiality, whatever its trappings, assumes a peculiar and more important focus and thrust which is clearly lacking elsewhere.[374]

Thus, typically, when it concerns a duty of confidentiality in offshore matters, it is this extended concept which is being addressed. As the majority of offshore countries have also inherited common law principles on bank confidentiality, the offshore confidentiality concept is a good example of the hybrid nature of offshore legal concepts. The common law and civil law foundations of the confidentiality principle have been merged to create a strong statutory model with an important policy focus. This is a unique legal phenomenon.

The term 'offshore' has become synonymous with jurisdictions enforcing such rigid confidentiality laws. The increased demand for financial confidentiality laws has

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[374] Indeed, the Confidential Relationships Preservation (International Finance) Act 1996, s 3(1) of St Vincent and the Grenadines specifically states that the 'public policy of the state is to protect and preserve ... confidentiality'. Although in these countries there are no separate confidentiality statures there are confidentiality provisions in individual legislation such as the Banks and trust Companies Act 1990, am'd (BVI), the International Trusts Act 1999 (St Lucia), s 61, the Registered agents and trustee Licensees Act 1999 (St Lucia), s 25 (however, the duty here is not general but is directed at the Director, his agent or an agent of the Financial Centre Corporation – the regulatory authority) and the Banks Act 1999 (St Lucia), s 19. The original s 24 of the Banks and Trust Companies Act 1990 (BVI) had a provision stipulating that all information disclosed to the Inspector, Registrar or Director of Financial Services was 'absolutely privileged'. The new s 24, however, provides for 'gateways' to disclosure enable foreign regulatory authorities to obtain information in strictly defined circumstances.

corresponded to the marked expansion in the number of foreign owned banks operating in such secrecy havens.[375]

4.3 Three Arguments about the Financial Secrecy Laws

Given the scrutiny financial secrecy laws and services have recently come under, both those commercial participants who trade in, and those governments that use such services to promote economic development, have drawn on various arguments that support the existence of such laws. Here, three arguments are noted. First financial secrecy laws are said to protect private assets from wrongful expropriation by public authorities.[376] Wherever a minority is subject to persecution by the majority, as exemplified by the Jews in Nazi Germany, this rationale finds justification. In fact, this type of argument was recently advanced by USA House Representative Ron Paul in his criticism of the *International Counter Money Laundering and Foreign Anticorruption Act 2000*.[377] This act gives significant discretionary powers to the Secretary of the Treasury to take action against other countries, foreign financial institutions, and classes of financial transaction that are identified to be a "primary money laundering concern". As Representative Paul observes in criticism of the act:[378]

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375 Antoine, above 363, 23-25.
376 Dennis Campbell, *International Bank Secrecy* (1992) viii.
377 The Office of U.S. Representative Ron Paul, 'Paul Renews Fight for Banking Privacy: Proposed Legislation Grants Dangerous Power to Federal Regulators' (Press Release, July 19, 2000).
378 Ron Paul, Opening Statement HR 3886 International Counter Money Laundering Act and Foreign Anticorruption Act of 2000 (2000) House Committee on Financial Services (Speech delivered at the Domestic and International Monetary Policy Subcommittee Markup).
<http://financialservices.house.gov/banking/6800pau.htm> at 24 October 2003.

> Bank secrecy itself is not necessarily indicative of a crime ... Bank secrecy is an important way for individuals to protect themselves – and possibly have the resources to save themselves and their loved ones. Enacting this bill into law in the 1930s would have been the equivalent of a death sentence to Jews in the Nazi era just as it would threaten those persecuted individuals now relying on bank secrecy.

The treatment of a minority within a given geo-political area is a domestic political issue upon which most international participants are encouraged to remain silent. Northern Ireland and the activities of the Irish Republican Army are an example. Depending on the individual's position, money laundering services either help to support a legitimate partisan struggle against a foreign oppressor, or to finance a terrorist organisation that relies on various criminal activities to support its operations. Similarly, take the example of tax avoidance and evasion. Many claim that financial secrecy laws provide a useful and important means by which financial assets may be sheltered from unfair taxation. The tax-evader is merely a "revolution for free enterprise" who refuses to abide by inefficient government regulation. Contemporary international consensus that harmful tax practices need to be addresses has created further pressure to do away with "bank secrecy statutes as a factor in international finance". This consensus is typified by the fact that in the USA consideration is being given to classifying tax offences as money laundering predicate offences.[379] The point remains, however, that financial secrecy laws have from

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[379] United States Department of the Treasury and United States Department of Justice, *The National Money Laundering Strategy for 2000* (2000) <http://www.treas.gov> at 3 November 2003.

time to time helped individuals protect their wealth and assets from unjust expropriation by repressive regimes.

Second, financial confidentiality merely forms part of the professional relationship between a banker and his/her client and should be accorded the same rights and privileges associated with other professional relationships like doctor-patient and lawyer-client.[380] The traditional rationale used to justify the existence of privacy rights that attach to these relationships concerns the need to protect the private affairs of the individual from unwarranted third party scrutiny.

Medical privacy is a manifestation of the highly personal nature of health related issues. Legal privilege, meanwhile, is not only a corollary of the rights of counsel and protection against self-incrimination, but also a reflection of the adversarial nature of the judicial system. Similarly, banker-client confidentiality is premised on the highly personal nature of each individual's financial affairs and the right of the individual to use his/her financial resources in a manner he/she deems to be appropriate.

It is of note, however, that the sanctity of each of these relationships is subject to exceptions. The relationship of lawyer-client is subject to a requirement that the relationship should not be used to shield unlawful activity; a requirement which certainly should also be applied to the banker-client relationship. The purpose of such confidential relationships after all is to protect the intimate details of the individual's activities from

[380] Campbell, above n 376, vii.

unwarranted examination and not to enable an individual to pursued activities that will deliberately cause harm to others.

A balance needs to be struck between the right of the individual to pursue his / her affairs in private and the right of the state to investigate suspected criminal activity. Consequently, the individual's right to deploy his / her financial resources as he / she deems appropriate should be protected from unwarranted third party scrutiny so long as the particular activity pursue is legal. The basis of the relationship between a banker and his / her client is one of contractual confidentiality, but there are exceptions, as overriding legal obligation and express or implied consent by the client.[381] The money laundering provisions that have been put in place over recent years have radically altered the relationship between banker and client because they do represent such an overriding obligation. The reporting provisions have the effect, under certain conditions, of creating for the banker an entirely different relationship with his / her client, no longer as confidant, but as police informant.[382]

Third, financial secrecy can be regarded as a fundamental right. Civil libertarians might argue that just as an individual's sexual preferences and religion orientations should be protected from discrimination, an individual's financial affairs ought to be protected from unwarranted third party scrutiny. Hinterseer argues that according to the principle of self-determination, an individual ought to be free to exercise his/her free will to pursue his/her own conception of the "good life" free from intrusion by third parties on the condition

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[381] And compare Peter W Schroth, 'Bank confidentiality and the war on money laundering in the United States' (1994) 42 *American Journal of Comparative Law* 369-91.
[382] Alldridge, above n 352, 270.

that the individual's actions do not cause harm to others. Moreover, the nature of the "good life" pursued by an individual is a highly personal and unique conception, about which third parties ought not to comment. To pursue the "good life", however, takes more than free will; resources and money are also required. The right of the individual to conduct his/her financial affairs in private is therefore fundamental. Pursuit of the "good life", does not entitle an individual to engage in activities that will cause harm to others. The right to the state to monitor various activities pursued by the individual is therefore theoretically acceptable. Financial secrecy is neither a fundamental, nor absolute, right. However, the balance that is struck between the need of the majority and the needs of the individual ought to be struck in a manner such that unwarranted intrusion by third parties is prevented or at least minimised. At the same time, where such intrusion does occur, safeguards need to be implemented to ensure that individual rights are adequately protected.[383]

Privacy is a basic human right and civilised society – as well as commerce – would be rendered impossible without it. The word 'privacy' like 'property' connotes what is peculiarly an individual's own. The common law utterly rejects the idea that the citizen belongs to the state. No clearer expression of that rejection was even seen than when Britain and the Commonwealth stood against what Winston Churchill described as a 'monstrous tyranny' founded upon the opposite principle. The German Socialist dictatorship completely subordinated the individual and the private to the demands of the

[383] Hinterseer, above n 366, 286-8.

state and its state police, had neither restraint from warrants nor any respect for business, bankers', lawyers' or family confidences.[384]

Seen from this legal and historical perspective, demands that foreign governments should be able to invade the privacy of the subject in Commonwealth countries becomes troublesome indeed. It is a serious concern that basic legal protections and rights have already been eroded by tax collection imperatives in OECD countries. It is a troubling notion to both offshore financial centres and their investors that foreign government officials should be able to extract information concerning the private financial affairs of families or companies without a local warrant showing good cause and without notice to persons affected.[385]

According to Wheelwright, in Australia, a taxpayer's right to privacy is more properly described as a statutory duty on government officers not to disclose information about taxpayers except in very limited circumstances. This is described in the Charter[386] as a commitment by the ATO to respect a taxpayer's privacy and to keep a taxpayer's information confidential in accordance with the law. The need to assure privacy is important for taxpayers, given the increased use of modern technology in tax assessment

[384] Terence & Deborah Dwyer, above n 268, 336.
[385] Ibid.
[386] The Taxpayers' Charter is a document developed by the Australian Taxation Office (ATO) in consultation with tax professionals and the community over more than two years. It lists taxpayers' rights and obligations, and standards of service which can be expected from the ATO. Detailed information on the matters covered by the Charter is provided in 15 explanatory booklets available from all ATO offices (or through the ATO website at http://www.ato.gov.au) eg, "Treating you fairly and reasonably", "Your privacy and the confidentiality of your tax affairs", "Your honesty and the tax system".

and collection, although taxpayers are not protected from the Commissioner's access to premises and information under ss263 and 264.[387]

The British document called the "taxpayer's charter" is not a charter of rights. Indeed, nowhere in the document is any statement of rights (in the legal sense) mentioned. This is despite the emotive content of the term "rights" in this context, especially when linked with the term "charter". It is central to the understanding of the operation of tax laws in the United Kingdom that there appear to be no such things as "taxpayer' rights". This phrase will not be found in any Act of Parliament or other formal document. The Bill of Rights, like Magna Carta and the Petition of Right were concerned about the status of Parliament against the king.[388] When Parliament became, in this sense, king,[389] it adopted the same approach as kings did – the assumption of an untrammelled power to choose how to tax. The taxpayer's only rights were the rights of property affected by a tax charge, and the right to appeal against or secure a review of any tax charge.

At the present, there is no right of individual privacy – rather a right, and duty, of governmental privacy. The taxpayer cannot demand to see any records held by government about her or him, but the government can demand information from a taxpayer. The taxpayer has no reserved rights at the legal level of family life or property, nor any protection against retrospective, disproportionate, discriminatory or taxes

[387] Karen Wheelwright, 'Taxpayers' Rights in Australia' in Duncan Bentley (ed), *Taxpayers' Rights: An International Perspective* (1998) 57, 74.
[388] The English Bill of Rights 1689, The Magna Carta (1215) and The Petition of Right (1628)
[389] Technically, the sovereign authority is not the Queen in Parliament. However, as was illustrated with the 1996 Queen's Speech, the royal element is purely nominal. Traditionally, the Queen opens the annual session of parliament by reading out a speech laying down the workload for the session. In 1996, the Queen did so in the customary manner, but the Prime Minister changed some of the items later that day in debate in Parliament.

otherwise perceived by a taxpayer as unfair taxes.[390] Such remedies as there are at the political or administrative levels only: those of the revenue adjudicator, the ombudsman, and the member of Parliament.[391]

4.4 Benefits of the Financial Secrecy Laws

Financial secrecy laws and services also provide certain beneficial, essential and, most importantly, legal economic benefits. The first benefit is that financial secrecy services like privacy laws enable economic actors to conduct their activities free from unwarranted scrutiny. According to Schneider, this has several advantages.[392] First, transactions can be structured in a manner that avoids unwarranted scrutiny by competitors and other interested third parties. Second, sensitive information can be stored in a place where third party requests for release of the information will be difficult, if not impossible, to achieve. Third, transactions can be arranged that might otherwise be extremely difficult or considerably more expensive to complete. Thus, a company is able to pursue its affairs in private, free from unwarranted third party scrutiny.

A second benefit derived by economic actors concerns tax planning. Taxes are popular to no one, and individuals and corporations are willing to go to great lengths to minimise their tax liabilities.

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[390] The Human Rights Bill will grant some of these rights formally for the first time in United Kingdom law.
[391] David Williams, 'United Kingdom Tax Collection: Rights of and Against Taxpayers' in Duncan Bentley (ed), *Taxpayers' Rights: An International Perspective* (1998) 331, 335.
[392] Jerome Schneider, *The Complete Guide to Offshore Money Havens* (1996) 96-100.

To minimise tax burdens, the use of offshore financial centres is useful. Their use has certainly given rise to aggressive practices, and contemporary concern about the financial activities being conducted within and through these jurisdictions as noted earlier, can be justified. Offshore financial centres enable companies to structure transactions to reduce and defer taxes, which therefore frees up capital to grow their business, improve efficiency, and create employment. Of course, offshore financial centres can be used to shelter financial structures that are abusive. As Levi notes, however, "The bulk of the financial transactions undertaken in offshore financial centres arises from the lawful activities of multinationals seeking to minimise taxation worldwide and to optimise the distribution of their profits."[393]

The use of money laundering type instruments and services is not illegal per se, but can be used either for legitimate legal business purposes or for illegal money laundering purposes; the difference depends on the intentions with which such instruments and services are used. The danger of course is that money laundering type services used in a legitimate manner may come to be abused and used to facilitate economic activity associated with money gained from illegal sources.

The financial industry, like any industry, seeks to create a safe economic environment, to act in a lawful manner, and to create a strong public reputation for service, trust and accountability. Undoubtedly financial secrecy services have performed an important role in most financial atrocities and criminal endeavours perpetrated since World War Two

[393] Michael Levi, *Customer Confidentiality, Money-Laundering, and Police-Bank Relationships: English Law and Practice in a Global Environment* (1991) 7.

and continue to shelter a number of abusive practices. Financial secrecy laws have a long and legitimate history and the three earlier discussed rationales all have merit to a greater or lesser degree.

According to Hinterseer, two important questions therefore arise. First, how to define the caveats that qualify the individual's right to privacy in financial matters. Second, how to construct the various legal requirements that will help to ensure that unlawful activity can be detected, investigated, and prosecuted in a manner that is efficient and economical, but which does not unduly compromise individual rights and freedoms. These questions concern how to strike an appropriate balance between the individual's interest in using his/her financial resources pursuant to the principle of self-determination, and society's interest in preventing abusive financial practices pursuant to the principle of social welfare. To strike this balance, governments do not necessarily need to implement onerous laws. Financial institutions and other economic actors have a legitimate concern to minimise costs and compliance burdens associated with regulation. It is expected of financial institutions and others to be supportive of money laundering legislation to the extent that it promotes transparency, stability, and a level playing field within financial markets. In this respect, the Wolfsberg Anti-Money Laundering Principles are pertinent. However, resistance would naturally rise to transforming into a criminal offence activity that was previously considered both profitable and legal.

The challenge for the legislator is therefore to control the ahuse of financial services without penalising those who would use the same services in a legitimate and legal manner. However, legislators have created a situation whereby financial institutions may be unduly penalised precisely because they have complied with their legal obligations mandated by the criminal law. This situation has arisen because inadequate consideration has been given to how the criminal and civil law currently interface.[394]

Accordingly to Bentley, for the taxpayer, it is important to determine the limits on the powers of the tax authorities to gather information. Due process demands that taxpayers should be aware of the requirement to provide information, that they should have the capacity to provide the information, that they should be given a reasonable time to do so, and that there should be a presumption that they are acting honestly unless they act otherwise. It is often a requirement that the taxpayer must be informed before a tax authority can request information about the taxpayer from a third party. Taxpayers should also have the right of access to information held about them by the tax authorities. Under the basic right to privacy there should be limits on the scope of the tax authorities' information gathering powers. Collection of tax does not require the provision of unlimited information. Even where there is possible tax evasion, the tax authority should restrict the information it gathers to what is relevant to the bona fide assessment to tax. It is not a valid argument to say that tax collection outweighs all rights to privacy as a matter of public interest. [395]

The gathering of information from taxpayers is predicated upon the tax authorities treating the information as confidential. Bentley asserts that, it is a question of balancing

394 Hinterseer, above n 383, 288-290.
395 Duncan Bentley, 'An Overview of Taxpayers' Rights' in Duncan Bentley (ed), *Taxpayers' Rights: An International Perspective* (1998) 35, 45.

the competing interests of the tax authorities to gather the information necessary for them to collect the right amount of tax, with the interest of individuals in maintaining their right to privacy. Tax systems should contain stringent secrecy provisions to ensure that basic privacy requirements are observed. The right to confidentiality of information should be supported by rules governing precisely how, when and where information relating to a taxpayer can be used, for example, in criminal proceedings. The rules should cover the passing of information within the tax authority, to and from other government and quasi-government departments, and to the courts and other judicial or quasi-judicial bodies. The rules should be particularly clear on levels of authorisation and the reasons required before confidential information is released to third parties.[396]

4.5 Political and Economic Motives for Attacking Offshore Laws

If criminal activity is not the true focus of offshore activity, and if it is demonstrable that offshore laws do not exist either to promote or conceal such activity, then why such an offensive has been launched against the offshore sector? The argument as previously discussed by Antoine, is that the real issue, concerns the loss of revenue, particularly but not solely, fiscal revenue flowing from onshore economies and filtering offshore. The revenue, albeit in savings which filters from onshore countries, results in the economic developing of many offshore countries, several of which can be labelled as developing countries.[397] The fear on the part of onshore countries of the loss of revenue as a direct result of offshore activity is not one to be dismissed. Already, non-offshore jurisdictions

[396] Ibid.
[397] This can be viewed as a kind of 'balancing effect'.

within the European Union are beginning to experience an increase in loss of revenue as a result of offshore business, as noted in the recent Boston Consulting Report 2003.[398] European unification has improved European citizens' ability to relocate their assets to other European countries and many investors are choosing to invest in European offshore jurisdictions such as Ireland[399] and in Asia such as Singapore[400] and Hong Kong.[401] The enrichment of offshore coffers at the expense of those onshore provides a powerful economic and political motive for the legal offensive aimed at the offshore sector. This factor cannot be ignored when the question of the acceptable limits of offshore activity and law are to be addressed.

The above point of view is underscored by a discussion on tax reform hy the UK Revenue in 1982. It was pointed out by the UK Revenue Board that the UK was losing £100 million annually in revenue due to the growing use of tax havens for tax avoidance purposes and the problems associated with the accumulation therein of profits and investment income.[402] This prompted the then Secretary of the Institute of Directors' Taxation Committee to respond:[403]

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398 "Winning in a Challenging Market: Global Wealth 2003", The Boston Consulting Group, July 2003.
399 'Greengrocers Flight', *The Financial Mail* (South Africa), 16 April 1996, 6.
400 Singapore is managing about US$2.2 trillion offshore assets. Figure provided by Pulses, a monthly publication of Singapore Exchange Limited, dated November 2003.
401 The total trade value of Hong Kong's offshore trade was HK$1,425 billion in 2000. Figure provided by Hong Kong Trade Development Council (2000) <http://www.tdctrade.com/econforum/boe/boe021101.htm> at 28 April 2004.
402 *Taxation of International Business*, UK Revenue Board, 1982, p. 16. In the USA the tax gap is close to 150 billion dollars a year. C. Greene, 'International Securities Law Enforcement: Recent Advances in Assistance and Co-operation' (1994) 27 *Vanderbilt Journal of Transnational Law* 635, 664.
403 Sandy Anderson, Press Release of the Institute of Directors' Taxation Committee, 28 June 1981, p. 1.

> The UK tax authorities have no business to set themselves up as the 'fiscal policeman' of the world. Such fiscal imperialism can only provoke retaliation by other governments jealous of their sovereignty. The proposal is unacceptable on grounds of both economic and constitutional principle and is impracticable.

The real concern of onshore countries in relation to offshore activity is often actual financial loss rather than high or moral principle. While it is clearly within the right of any country to safeguard economic and political interests, this element must be recognised for what it is and should not be allowed to cloud the relevant legal issues, such as the validity of the offshore interests by attacking offshore law and policy. The argument thus follows, that all things being equal, offshore states have a similar right to safeguard their economic and political interests by upholding them. This is an important argument in the difficult issues relating to comity, taxation and the confidentiality principle. It is central to the question of legitimacy.

4.6 Offshore Responses to Erosion of the Confidentiality Principle

Developments restricting the application of the confidentiality principle have occurred under offshore law largely as a result of onshore influences. This includes statutory developments as well as the increasing recognition by the offshore courts that it is both desirable and appropriate to restrict the principle in certain circumstances. This means that the extent of the duty of offshore confidentiality, notwithstanding its pretence at a statutory certainty, is constantly being redefined, even hy offshore courts.[404]

However, it can be seen that OFCs come to the international arena at great risk. It is argued that the erosion of the confidentiality principle has the potential to prejudice their economic interest. The cost of co-operation in such efforts may be increased competition in the offshore marketplace, where the stakes are already high. OFCs are painfully aware that any moves against confidentiality could trigger an exodus from their offshore industry to other more secretive, and consequently more attractive, jurisdictions. Hence, this is a serious obstacle to mutual assistance efforts. In recent times, a refusal to cooperate has invited 'blacklisting' or even sanctions from the OECD.[405] Thus, a fine balance must be struck between co-operation and competition. That balance swings in favour of disclosure where criminal, but not civil matters are involved. Indeed, at an emergency meeting of the CARICOM Heads of Government held in The Bahamas in October 2001, the Finance Minister of The Bahamas had occasion to underline that while The Bahamas had co-operated extensively in the fight against crime and, more recently, against terrorism, they had to be careful to preserve confidentiality for non-criminal and civil matters.[406]

The highly competitive nature of OFCs points to the unlikelihood of the repeal of their much prized and guarded confidentiality laws. In fact, since anti-secrecy initiatives by the

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404 Antoine, above n 375, 81.
405 This is a contentious issue.
406 CARICOM is the Caribbean Community – a regional entity. The remarks were made on October 2001; BBC Caribbean News.

international community initially targeted the major offshore jurisdictions, for example, Switzerland and the Cayman Islands, other OFCs perhaps saw this intervention as a golden opportunity to gain a larger share of the industry.[407] Consequently, the large majority of OFCs have been less enthusiastic about far-reaching inroads into confidentiality. The threat of sanctions by the OECD has undoubtedly tempered this reluctance. However, despite the fact that the OECD seems to seek to generalise all aspects of offshore confidentiality with a broad brush of tax arbitraging, its mandate is essentially confined to taxation harmonisation.[408]

The advent of greater harmonisation of taxation laws in the European Union has catapulted this issue forward. The extent to which harmonisation will affect competitiveness to the benefit of non-European Union offshore financial jurisdictions at the expense of European offshore countries, such as Ireland and Luxembourg, is yet to be seen. Already, the UK is showing signs of capital flight as a direct result of the European Union.[409] As the world of business becomes even more transnational, movements of finance becomes swifter. Investors are always willing to relocate to get a better deal and, given the inherent mobility of offshore finance, the threat to offshore industries as a result of what may be viewed, from the perspective of investors, as unfavourable changes is both imminent and real.

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[407] Antoine, above n 404, 82.

[408] Ibid 82.

[409] See 'Greengrocers Flight', *The Financial Mail* (South Africa), 16 April 1996, 6, which reports that British investors are choosing to put their assets in low tax jurisdictions within the European Union, such as Dublin and Luxembourg.

OFCs are ever mindful of the tensions between confidentiality and disclosure in the interest of cooperating with international efforts at disclosure. Their position is that the surrender of financial information must be within clearly defined boundaries. The laws and policies on disclosure and the compromises toward disclosure made in international legal assistance agreements reflect this. Courts too must he aware of such policy considerations. Nevertheless, the very existence of such disclosure mechanisms is further evidence of the realisation by offshore countries that appropriate limits must be set for the confidentiality principle.

4.7 Methods to Obtain Information under International Cooperative Efforts

There are three main methods by which an onshore country may attempt to obtain information from offshore countries for use in trials or legal investigations. These are:

1) letters rogatory or letters of requests;
2) unilateral methods, such as the subpoena or summons; and
3) international treaties and other statutory instruments on legal assistance.[410]

Of these, the first two may be viewed as more traditional methods.

Of the three methods, it is the use of unilateral methods which is most likely to raise controversial legal issues. Further, conflicts of laws may arise. The use of unilateral

[410] Antoine, above n 408, 85.

methods, for example, is likely to raise contentious legal issues relating to comity[411], i.e. the respect by one country for the laws of another and sovereignty. This was the problem which arose in the Cayman Islands and The Bahamas.[412] The USA subpoenaed and threatened banks which had branches in these jurisdictions with contempt for their refusal to surrender bank information. These refusals were a result of the banks' compliance with offshore confidentiality laws. This expanded territorial jurisdiction was seen as a violation of sovereignty.[413]

In relation to the summons process, a major problem may be that there is no basis for jurisdiction over persons or corporations domiciled outside the onshore country. Consequently, if a person refuses to appear, he or she cannot be sanctioned unless he or she enters the onshore jurisdiction or is a citizen of that state.

While the use of letters rogatory is less controversial, it is likely to be difficult in application[414] as they can be time-consuming and complicated. Also, the success may depend on offshore legislation which is too limited in scope to be of any real assistance.

Mutual legal assistance instruments are less invasive than unilateral mechanisms. They balance the needs of law enforcement with those of sovereignty and the national interests

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[411] Gilbert N M O Morris, 'The Loss of Sovereignty, the United Nations, and Offshore Financial Centres' (2001) *Tax Notes International* Sept 10 2001, 1297.
[412] See extraction from dissertation of John S Bain, Money Laundering: A Practical Analysis With Particular Reference To Bahamian And Caribbean Offshore Institutions (MBA, University of Wales and the Manchester Business School, 1998) at <http://www.spgi.org/articles/bain_APracticalAnalysis.shtml>.
[413] Antoine, above n 410, 86.
[414] A letter rogatory is a process which invokes the legal process by means of a formal request issued by a judge in one country to the judiciary in a foreign country. The request requires the sanction of the foreign court in order to prevent the violation of that country's sovereignty. Letters rogatory may further involve the diplomatic process.

of the requested country. Indeed, this was the very reason why the Cayman Islands moved toward such treaties.

Mutual assistance in criminal matters is the process by which states, through designated regulatory and judicial hodies, seek and provide assistance for use in criminal prosecutions from the other states. Mutual legal assistance often has two components: first, assistance in the provision of evidence and, secondly, assistance in the tracing and restraining of the proceeds of crime.[415] More recently, a third element, that of confiscating the proceeds of a crime, has been introduced in offshore jurisdictions. International legal assistance has a greater reach than mutual legal assistance in that it is not confined to criminal matters and need not depend on reciprocity.[416]

The reach of international legal assistance vehicles, both in form and suhstance, may be much greater than the traditional methods such as the letter rogatory. First, they go well beyond the judicial process. For example, such instruments may permit disclosure in relation to requests in investigatory proceedings such as the grand jury proceeding, as opposed to limiting it to judicial proceedings. Mutual legal assistance mechanism may also encompass more varied matters of substance, when they are in treaty form. Nevertheless, it is possible to broaden the range of possible offences under letters rogatory by dispensing with dual criminality requirements and allowing the process to be used for unfamiliar forms of crime.

415 Antoine, above n 413, 86.

416 Note that international legal assistance is used here to denote a process which ean encompass both mutual legal assistance and other forms of assistance such as letters rogatory.

Jurisdictional problems also plague the letters rogatory and mutual legal assistance processes. For example, while it is probable that an English court will now order disclosure where documents located in England are sought, it is less likely to heed requests for assistance where an English branch or parent of a bank is targeted for documents located offshore. The rule in *Libyan Arab Foreign Bank v Bankers Trust Co*[417] that the proper law is the situs of the bank account, still obtains, and should continue to protect offshore banks with onshore associations. Continuing jurisdictional and procedural difficulties lead to increased efforts at treaty formation through which offshore countries are obliged to heed the terms of the instrument and ignore traditional and legalistic hurdles. Mutual legal assistance treaties represent:[418]

> A step forward in international relations in that they offer rules and procedures that greatly simplify previous practices and offer an alternative to questionable techniques such as the kidnapping of information in foreign countries and attempting to enforce USA subpoenas in foreign jurisdictions.

Nevertheless, even treaties may have difficulty overcoming procedural and jurisdictional obstacles in order to defeat the offshore confidentiality principle.[419]

4.8 The FATF Challenge – Meeting the Standards

[417] [1988] 1 Lloyd's Rep 259.
[418] Ellis and Pisani, 'The U.S. Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis' (1985) *International Lawyer* 189, 222.
[419] Antoine, above n 415, 85-7.

According to Antoine, no single entity has been as instrumental in defining the way forward in the fight against money laundering and international financial crime than the FATF. The work of the FATF has pointed several deficiencies in the world's financial institutions which exacerbated and even encouraged money laundering. This has led to the formulation of strict new standards. They are the standards which offshore financial centres are required to meet. Not surprisingly, many of these involve offshore confidentiality.[420]

Much progress has been made by OFCs in bringing their laws up to FATF standard, hence the relatively young statutes which exist.[421] Many jurisdictions have been removed from the list of 'non-cooperative' countries such as the Cayman Islands, The Bahamas and Panama.[422]

The FATF's primary emphasis as has been seen, is on adequate control, regulation and supervision. Both the prevention and detection of money laundering are to be targeted as well as appropriate punishment. In these objectives, legal as well as practical impediments to efficient anti-money laundering regimes are to be examined. The latter includes, for example, obstacles which restrict supervisory and investigatory powers of judicial and administrative authorities, or the absence of such powers. Thus, the concern

[420] Ibid 151.
[421] 'We are pleased to have the good name of The Bahamas restored, But we will continue to pay close attention to evolving international standards to ensure continued compliance' said Wend Warren, CEO and Executive Director of The Bahamas Financial Securities Board, "Bahamas Special Report – The Third Pillar" (Jeremy Hetherington-Gore, Bahamas, 2001).
[422] See Appendix U for the 2004 list of NCCTs.

of the FATF too includes the presence of a satisfactory environment to prevent money laundering.[423]

4.8.1 Loopholes in Financial Regulation

Inadequate or ineffective regulation and supervision of financial institutions involve lax requirements for the licensing of offshore companies and other entities. Unsatisfactory conditions begin with few or no requirements for assessing the backgrounds or identity of managers and beneficial owners. This is exacerbated by secrecy or confidentiality rules thereafter, including the existence of anonymous accounts. These perceived deficiencies create a danger that such entities can be operated by criminals.[424]

In addition, requirements to keep (for a reasonable time, such as five years) records verifying the identity of clients and beneficial owners, are often lacking. This is worsened, in most OFCs by the lack of information about transactions made and the often deliberate legal or practical obstacles to the means of obtaining such information.

Significantly, the FATF singled out the rules for professional secrecy and banking secrecy for negative comment. While noting that such rules can be based on valid grounds, they should not pre-empt supervisory responsibilities and investigative powers of the administrative and judicial authorities in the fight against money laundering. More particular was the concern that such secrecy or confidentiality ohligations could not be

[423] Antoine, above n 420, 151-2.
[424] Ibid 152.

lifted by authorities in criminal investigations relating to money laundering, a concern which is not justified, according to Antoine.

The lack of routine confidential reporting requirements based on a standard of suspicious reporting was also noted. Such requirements should be supplemented by adequate provision for competent authorities to receive reports and should be mandatory.[425]

Other regulatory issues identified by the FATF include the impediments posed by commercial law. Such laws, in particular, laws on company formation and trust laws, have the ability to hinder the prevention, detection and punishment of criminal activities. Shell corporations and nominees, for example, may be used to launder the proceeds from crime.[426] These problems are compounded by confidentiality obligations and the inability to identity beneficial owners and beneficiaries.[427]

4.8.2 Obstacles to International Co-operation

The several restrictions on the transmission of information to foreign authorities seeking legal assistance is perhaps the main concern of the FATF in the area of international co-operation. Identified as legitimate restrictions are the following: reciprocity in exchanges, confidentiality requirements on the part of the requesting authority, the need for clear rationales for the information requested and the status of the requesting authority. The need for administrative authorities with efficient powers for exchanges of information

425 See Appendix G, FATF 40 Recommendations, particularly Recommendations 14-19.
426 See Appendix G, FATF 40 Recommendations, particularly Recommendations 10-13.
427 Antoine, above n 424, 151-2.

with foreign authorities is also an important concern of the FATF.[428] Other restrictions may be considered 'abusive'. In particular, the refusal of co-operation on the ground only that the substance of the request relates to tax matters, especially where tax evasion is involved, is viewed as a 'detrimental practice' for international co-operation against money laundering.

Significantly, the FATF also highlighted administrative and practical hurdles in its discourse on international co-operation. Long delays and 'obvious unwillingness to respond constructively to mutual legal assistance requests', for example, were viewed as detrimental practices.[429] So, too, was the failure to provide administrative and judicial authorities with the necessary resources to conduct investigations, not only for mutual legal assistance, but in all anti-money laundering proceedings.[430]

4.9 Comity Principle and Confidentiality

According to Antoine, efforts toward disclosure at the expense of offshore confidentiality laws may involve conflict of laws. The question of sovereignty with respect to confidentiality is paramount, and has been highlighted by offshore courts in responding to the OECD challenges to the OFC.

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[428] See Appendix G, FATF 40 Recommendations, particularly Recommendations 30-40.
[429] Indonesia and Myanmar were highlighted as countries which have not made adequate progress in eliminating money laundering. Financial Action Task Force, *Annual Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2003).
[430] Antoine, above n 427, 151-3.

It is argued by Antoine that the OECD and its member states are violating international law, according to the Articles of the Draft Declaration on Rights and Duties of States (1949) by The International Law Commission of the UN.[431]

1. Article 1: Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.
2. Article 2: Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognised by international law.
3. Article 3: Every State has the duty to refrain from intervention in the internal or external affairs of any other State.
4. Article 14: Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

Under Article 1 of the Statute of The International Court of Justice, the International Court of Justice has jurisdiction to hear a complaint from one or more of the 35 nations under attack from the OECD and its member states. The Articles of the Draft Declaration on Rights and Duties of States have effect in international law, under Article 38 of The International Court of Justice Statute.[432]

[431] *Draft Declaration on Rights and Duties of States* (1949) art 1-3, 14.
[432] Paul Baxendale-Walker, 'OECD Demands and International Law', *The OFC Report 2004* (2004) 22. See also Paul Baxendale-Walker, 'Defending Gibraltar And Developing Britain's Offshore Territories: In

The comity principle is an extension of the principle on territorial sovereignty. It sets the standard for resolving conflicting jurisdictional issues which may arise. In its legal sense, comity is:[433]

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws.

It is 'the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum'.[434]

The key principle underlined in the comity rule is the recognition that states have sovereign interests which need to be reconciled. The principle recognises each of these conflicting interests as legitimate but acknowledges the necessity for one state to succumb to the other's interest if their interest is recognised as greater. Where a potential jurisdictional conflict exists, a court should look beyond the *lex fori* and consider a

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Defence of State Sovereignty' (Speech delivered at the Conservative Party Conference Fringe Event, Bournemouth, 9 October 2002.

[433] *Hilton v Guyot* 159 USA 113 163-164 (1894), Its English expression is found in F Mann, "The Doctrine of International Jurisdiction Revisited After Twenty Years", *Studies in International Law,* Oxford: Clarendon Press, 1973 (reprinted in CA Mann, *Further Studies in International Law* (1990), p. 31)

[434] *Laker Airways v Sabena* 791 F 2d 909, 937 (DC Cir, 1984), In the USA the comity principle is strengthened by the act of state doctrine originating from *Underhill v Hernandez* 168 USA 250, 252 (1897), Sup Ct that states: 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of the country will not sit in judgement on the acts of [foreign] government done within its own country.'

foreign state's interest.[435] Comity is seen as essential in preserving international harmony and good relations between states.[436]

As the confidentiality principle is grounded in the national interest of the offshore state, conflicts arise in areas where both onshore and offshore states assert jurisdiction to proscribe and enforce rules of law. Offshore states have an interest both in the sovereignty of their legal systems and the stability of their economies which are threatened by attempts to undermine confidentiality laws. The contrasting attitudes toward confidentiality between offshore jurisdictions and the major onshore countries may lead not only to political conflict, but to conflict of laws. It is argued that there is a delicate balance to be struck between the utility of confidentiality laws in an offshore state which uniformly denies access to information in favour of preserving that country's economy, and the requests for information from onshore jurisdictions in an attempt to detect and prevent undesirable activity facilitated by such confidentiality practices.[437]

In 1967 the Social and Economic Council of the United Nations founded what is today its Ad Hoc Group of Experts. The group is composed of 25 members, experts, and tax administrators from 15 developing and 10 developed countries. As the UN group evolved, it was given various tasks such as guidelines for tax treaties, proposals for

435 *Hilton v Guyot* 159 USA 113 (1895).
436 *Oetzen v Central Leather Co* 246 USA 297, 304 (1918).
437 Antoine, above n 430, 273-8.

international cooperation to combat tax evasion and avoidance, and international cooperation to reduce incompatibilities between tax systems.[438]

The United Nations, like the International Monetary Fund, has criticized the workings of the OECD and FATF, arguing -- in the spirit of national sovereignty -- as an apparent defence of members of the UN General Assembly against intrusions by external agencies that have no jurisdiction in law. The Ad Hoc Group recognized the need for legal legitimacy in all state-to-state and agency-to-state relations in the international arena. Morris asserts that, however, such rhetoric may provide little solace to the OFCs since it appears to be public relations "spin". The intent of the Ad Hoc Group is apparent: It states "the inability to obtain information from tax haven countries and tax information not available within its jurisdiction impedes the efforts of many tax administrations to deal effectively with the cases of tax avoidance and tax evasion." It has opted for a series of bilateral treaties which link the developing world with the developed world; with the former giving up its tax information, whilst the latter developed countries offer assistance to developing countries to enable them to carry out exchanges of information procedures to control harmful tax competition. This is apparently taken to be a fair exchange.[439]

According to Antoine, the conflict of laws typically arises where banks, companies or individuals are called upon by onshore states to produce documents or other information concerning offshore business.[440] This is in situations where compliance may invite

[438] United Nations: Department of Economic and Social Affairs, *Ad Hoc Group of Experts on International Cooperation in Tax Matters* <http://www.un.org/esa/ffd/ffdtaxationmandate.htm> at 10 July 2004.
[439] Morris, above n 411.
[440] Antoine, above n 437, 275-8.

criminal or civil sanctions under strict offshore confidentiality laws. Where, simultaneously, offshore states seek to protect their confidentiality laws and onshore states, their legal interests in disclosure, the result is a 'jurisdictional deadlock'. The subject of disclosure proceedings must then make a choice whether to obey the offshore or onshore law forum. The dilemma is made even more acute as such entities or individuals also face potential legal sanctions such as contempt actions from onshore courts for failure to produce compelled information.

The question to be resolved, therefore, is which law is to be followed, that of the offshore jurisdiction protecting confidentiality, or the onshore country compelling disclosure? This is the fundamental issue posed in the following analysis, a challenge which has raised complex issues of international law and political sovereignty. The subject involves both a jurisdictional issue based on geographical territorial limits and one of conflict of laws in relation to the substantive content of such laws. These two questions are inextricably linked. An artificial separation of the two issues is made here merely for purposes of clarity.

The dilemma posed by the comity question has been caused mainly by the deliberate extraterritoriality initiatives of onshore states. Equally problematic is the conflict which arises from the polarisation of offshore and onshore attitudes toward disclosure and the limits of confidentiality laws. This goes beyond matters of mere jurisdiction, tending toward a dichotomy in philosophical attitudes on the nature and importance of financial confidentiality and, by implication, the sovereignty and legitimacy of laws which uphold it. This polarisation is most evident in relation to tax matters. Offshore and onshore states do not always share the same views on the matter of classification of criminal offences or litigation techniques. Consequently, offshore states are unlikely to view as appropriate, onshore countries' unilateral attempts to thwart confidentiality for such purposes.

Disclosure initiatives raise questions as to the extent to which a jurisdiction can compel openness ahout banking information in another country where confidentiality laws are in effect. The outcome of this question, centred around comity, hinges on the legitimacy of offshore confidentiality. Some countries, particularly the USA, follow a 'wide approach' to confidentiality. They pursue disclosure aggressively, even where conflicts of law are apparent. While offshore jurisdictions do not deny that there are circumstances where confidentiality in inappropriate, typically they adopt a 'narrow approach'. These differences in perspective have evolved into a situation where those onshore countries pursue a unilateral solution to perceived problems.[441]

It is not apparent that onshore courts have properly considered offshore interests in their determinations under the comity principle. The facts that confidentiality is one of the pillars of the offshore industry, and that the offshore industry is essential to the economic and political survival of such nations, is largely ignored. As have been previously noted, offshore nations which make breaches of bank confidentiality statutory and/or criminal offences, are typically countries with limited natural resources, dependent on finance and

[441] Ibid.

banking.[442] Their domestic law has been tailored aggressively to encourage the formation and operation of businesses within their territories, it is therefore logical that they should protect their economic well-being in the same way that other countries, including the USA, protect their economies.

Onshore courts, primarily USA courts, explicitly recognise their objective in undermining confidentiality as part of their wider economic and political interest in obtaining tax revenue and law enforcement. Yet, mention, in the literature is hardly even made of offshore states' equally important, or perhaps greater, interest in upholding confidentiality as a means of protecting the offshore financial sector, the primary means of economic development. This is the major difficulty with the comity principle applied in offshore law.[443]

Nevertheless, there is no common front on the part of the major onshore countries on the question of anti-confidentiality policy, for as yet there is no consensus as to the degree of intervention which is permissible by the country desiring information. The wide USA approach is not in line with other onshore countries, 'such as the UK'. The difference can be traced in part, perhaps, to the economic and political losses which the USA suffered as a result of offshore investment.[444] This has been reflected in legal policy which often

[442] I Paget-Brown, 'Bank Confidentiality and Criminal Matters: Cayman Islands and United States: Cooperative Development' (1988) 20 *Case Western Reserve Journal International Law* 369, 374.
[443] Antoine, above n 440, 273-5.
[444] US loses an estimated $70 billion in tax revenue each year due to assets being hidden in offshore tax havens. The Bush administration has shifted the US focus in dealing with tax haven countries away from an international effort to overhaul tax structures and toward negotiated treaties that allow easier US pursuit of suspected cheaters. See J Richard Duke, *Cayman Exchange of Information Agreement* (2002) Trusts & Trustees <http://www.trusts-and-trustees.com/trends/td_v8_iss2.html> at 28 April 2004.

appears to be self-centred in terms of the comity question.[445] Consequently, there is no uniform standard on the extent to which the confidentiality principle should be protected where conflicts of laws issues are at stake.[446]

The UK, by its lack of TIEAs, has not been an interventionist as the USA in challenging foreign confidentiality laws, preferring to preserve principles of comity between nations and adhering to a restrictive view with regard to territorial jurisdiction. To some extent, the UK is compromised by the involvement of many of its dependencies in the offshore business. Further, in the UK, there has been opposition from within to proposed expansion of powers of inspection in relation to banking documents for purposes of fiscal offences. This is even in the pursuance of international measures against crime.[447] In contrast, the policy of the USA to utilise unilateral measures, such as the subpoena and grand jury proceedings against confidentiality, constantly to extend its jurisdiction and to assert the supremacy of its domestic interests beyond its shores has engendered much resentment, even from other onshore countries. This has resulted in a position of 'extreme isolation ... from most other countries'.[448]

It is argued that offshore states are under no moral or legal obligation to assist onshore states in their law enforcement efforts in fiscal matters. The counterview that the fact that

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[445] Walter and Dorothy Diamond, *The United States as an Offshore Centre?* (2002) Trusts & Trustees <http://www.trusts-and-trustees.com/trends/td_v8_iss2.html> at 28 April 2004.
[446] Antoine, above n 443, 274-7.
[447] The Bankers Association argued that the extension of the Criminal Justice (International Co-operation) Act 1990 (UK) to fiscal matters might have adverse consequences for London. See Note [1990] British Tax Review 1.
[448] Francis Neate and Roger McCormick, (eds), *The Law of Confidentiality* (1990) Introduction

fiscal matters form the bulk of the subject matter of disclosure requests is not helpful to onshore cases.

Hence it is one view that the confidentiality principle must sometimes be sacrificed to a greater interest in disclosure when competing interests are balanced. This is so, for example, where serious international criminal matters are an issue, an opinion shared by offshore courts.[449] However on the other hand, seeking an appropriate balance does not mean a carte blanche denial of the confidentiality interest in all circumstances where there are conflicts of laws, as sometimes appears to be the present judicial practice. Rather, offshore jurisdictions must be given the opportunity to define the limits of their confidentiality laws fairly. It is therefore argued that they should not be forced into surrendering to greater political and economic powers disguised as legal interests. A just appreciation of the comity principle allows such an exercise by ensuring the consideration of the interests of both onshore and offshore states. It is only within such a construct that the extent to which the offshore confidentiality principle is justifiable, can be truly appraised.[450]

4.10 OECD's Attitude Towards Bank Secrecy

[449] British Virgin Islands' Mutual Legal Assistance (USA) Act 1990 (No. 5 of 1990) and Criminal Justice (International Co-operation) Act 1993 (No. 8 of 1993). The Bahamas' The Mutual Legal Assistance (Criminal Matters) Act, 1988

[450] Antoine, above n 446, 273-8.

The OECD Report on *Improving Access to Bank Information for Tax Purposes*[451] ("The Bank Information Report") was prepared by the OECD Committee on Fiscal Affairs and unanimously approved by all 29 OECD member countries. The Bank Information Report noted a perceived imbalance between the ability of taxpayers (individuals and companies) to operate in the increasingly borderless world of globalisation, and the contrasting inability of tax collectors who are still required to operate along strict national boundaries. Accordingly, The Bank of Information Report suggested that this imbalance should be addressed by "enhanced international co-operation for the effective application of tax laws." To that end it established an ideal, namely that all OECD member countries should permit access to bank information, directly or indirectly, for all tax purposes, so that tax authorities could discharge their revenue-raising responsibilities and engage in "effective exchange of information" with their partners.[452]

The OECD argument is invidious: it is essentially "why should you object to anybody accessing your personal information unless you have something to hide?". The hidden danger in this argument is that it entirely ignores that privacy is a 'right'; that it has been painstakingly evolved, fought for, and preserved for centuries, often in the face of quite intrusive forces; and that there is nothing to be ashamed of in simply wanting to remain 'private'.[453]

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[451] Organisation for Economic Cooperation and Development, *Improving Access to Bank Information for Tax Purposes* (2000 OECD)
[452] Bennett, above n 255, 25.
[453] Ibid.

Post the September 11 attacks, both the USA (Kerry & Levin / Grassley Bills) and the G-7 (06.10.01) have moved to further tighten AML (Anti-money laundering) legislation to undermine the financial supports of international terrorism.[454]

The USA has consistently maintained the position that it is not prepared to agree to the automatic exchange of information. Whilst the USA is not prepared to countenance automatic information exchange they are prepared to have "on request" tax information exchange agreements with the whole of the EU, negotiated on a bilateral basis. Importantly the USA will agree to exchange information in relation to alleged non-disclosure of income or tax fraud.[455]

4.11 OECD and the Confidentiality Principle

The OECD 'Harmful Tax Practices' report claims that harmful tax competition is achieved by the operation of tax regimes which facilitate and even encourage the reduction of tax burdens imposed by high tax countries. This 'tax competition' it is alleged, distorts trade and investment and erodes national tax bases. There is, therefore, a need for greater convergences in tax systems to enable a more 'level playing field'. The report explored three themes; transparency, exchange of information and non-discrimination. Two of these relate directly to offshore confidentiality.[456]

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[454] Ibid 30.

[455] David Lawless, *The Savings Directive Miracle!* (2003) PricewaterhouseCoopers, Republic of Ireland <http://www.pwcglobal.com/Extweb/service.nsf/docid/8B1B6AC49D9ABD3B80256CDF003F7AE7> at 3 November 2003.

[456] Antoine, above n 450, 314-6.

The OECD complained that mobile capital and labour were being attracted away from countries with high taxes to those with low taxes.[457] This, in turn, undermined the process of tax collection in such high tax countries. The report did not ostensibly criticise the concept of competition in fiscal affairs itself and even acknowledged that some tax competition could be beneficial. However, the question of 'harm' is raised in relation to what OECD regards as 'poaching' the tax base that 'rightly' belongs to another country in the context where a preferential tax regime is being offered to overseas individuals and businesses by the 'poacher', the offshore financial jurisdiction.[458]

The OECD asserts that money laundering is encouraged hy OFCs and, therefore, cross-horder information on tax and other activities should be exchanged. Offshore jurisdictions have no natural inclination to exchange information with high tax countries in order to improve compliance. Accordingly, it is argued that money laundering is a more compelling rationale for such an ohjective. The initial justification for the attack on OFCs was, therefore, on this ground. As offshore jurisdictions have continually complied with demands for better money laundering controls, the focus has shifted to extending information flows[459] and to the construction of a legislative architecture, for the purpose of enforcing tax laws, this clearly has important implications for confidentiality generally.[460]

[457] In the OECD Report 2000, the OECD retracted on its challenge to tax neutral or tax-free regimes. The OECD Report 2000 states that the OECD project is not intended to promote the 'harmonisation' of income taxes or structures, nor is it about 'dictating to any country what should be the appropriate level of tax rates'.
[458] Antoine, above n 456, 314-6..
[459] For example, under mutual legal assistance treaties.
[460] Antoine, above n 458, 314-6.

Excessive bank secrecy is viewed as not only encouraging money laundering but also contributing to a lack of transparency in financial information, undermining onshore tax compliance and law enforcement efforts. The offshore trust and international business company, came in for particular criticism because of their capacity to hide the identity of the beneficial owner of assets. The OECD urges the maintenance of records of such beneficial owners and the exchange of relevant information and other data requested by onshore countries in the enforcement of their laws and tax policies, initially for criminal tax matters only. This includes provisions for the routine exchange of information by way of treaties.[461]

4.12 Conclusion

The analysis in this chapter has demonstrated that if current trends continue, the OFCs will have little choice, in the face of such focused and antagonistic display of global hegemony, but, as appears to be happening, to realign their legal regimes toward the model suggested hy the OECD.[462] In particular, this means broadening the avenues of disclosure. The policy objectives articulated in these initiatives have already begun to shape the direction of new fiscal policies, both in offshore jurisdictions and high tax

461 Ibid.

462 The Model Agreement on Exchange of Information on Tax Matters (the Model Agreement) was developed within a specially created working group, the "Global Forum Working Group on Effective Exchange of Information." This group, which was co-chaired by Malta and the Netherlands, consisted of representatives from Aruba, Australia, Bermuda, Kingdom of Bahrain, Canada, Cayman Islands, Cyprus, France, Ireland, Isle of Man, Italy, Japan, Malta, Mauritius, Norway, Netherlands, Netherlands Antilles, the Republic of the Seychelles, the Slovak Republic, San Marino, the United Kingdom, and the United States. The Model Agreement is available on the OECD website at http://www.oecd.org/ctp. The Model Agreement seeks to promote international co-operation in tax matters through exchange of information. In its introduction, the Model Agreement notes that it is important for as many financial centres as possible throughout the world to meet the standard of tax information exchange and it encourages all economies to co-operate in this endeavour.

onshore countries. This does not mean, however, a capitulation to all of the demands made by the OECD. Rather, a more balanced approach is needed to work out rational principles of fairness in what is today a changed commercial law environment heavily reliant on globalisation.

In the following chapter, an analysis of the initial hostile and dictatorial tone of the OECD has been tempered somewhat because of the responses by offshore jurisdictions themselves and certain commentators from USA, UK, and Australia.[463] The Commonwealth Secretariat, and even the British Press, in its role of exposing some of the hypocrisies relating to the money-laundering accusations, have also helped to balance the discussion.

The commitment required by OFC's in regards to "transparency" has also highlighted many examples of stifling hypocrisies:[464]

1. beneficial ownership of companies and partnerships to be registered with the government, but UK company law prohibits the disclosure on share registers of beneficial ownership;
2. settlers and beneficiaries of trusts to be registered with the government, but the creation of trusts is completely secret in the UK;

[463] Basson, Alex, 'Harmful Tax Competition: An Evaluation of the OECD Initiative' (2004) 34 *Tax Notes International* 1037, 1051-2.
[464] Baxendale-Walker, above n 432 'OECD Demands and International Law'.

3. trusts to draw up accounts in accordance with internationally accepted accounting standards and publicly filed, but not in the UK where there is no legislation governing trust accounts;
4. free government access to bank information of enterprises, individuals and trusts, but this is denied in the UK by the Data Protection Act and banking confidentiality laws, which can only be overridden by a Court order;
5. abolition of the ability for investors to negotiate the tax rate to be applied, but thousands living in the UK benefit from negotiated "forward tax agreement";
6. abolition of share warrants to bearer, but not if issued by an English incorporated company under section 188 Companies Act 1985.

Hence, the High Consultations on OECD Harmful Tax Competition Initiative paved a way forward, relying more on co-operation and dialogue. A working party was established comprising members of offshore jurisdictions, the Commonwealth Secretariat, international financial institutions, and the OECD to work out some of these more contentious issues.

Even so, the appetite for offshore financial services and, in particular, tax migration structures continues to steadily increase. Offshore clients are often sophisticated and determined and are unlikely to surrender their right to more efficient investment opportunities easily. The road points to compromise and accommodation of the several conflicting interests between such investors, their host countries and powerful onshore nations.[465]

It has been argued in this Chapter that the power of national legislators is eroding, even in the field of criminal law, which most of them still regard as their chasse gardée. Given the fact that the territorial range of domestic criminal law is by definition limited, the clout of municipal legislators is also limited. An effective response to transnational crime phenomena such as money laundering therefore requires that legislation regarding law enforcement is, at least in part, taken over on a higher, international level. The traditional approach to this is has been by the negotiation of bilateral or multilateral treaties. This is, however, a cumbersome way of working which often involves lengthy negotiations and difficult ratification procedures. Its effectiveness is especially doubtful in view of the fact that the actual implementation of what states agree on an international level, still depends on the willingness of those states to implement it domestically.

It is not surprisingly therefore that international law enforcement is increasingly based on other types of international instruments such as non-binding recommendations (e.g. the FATF recommendations) or by supranational binding instruments (e.g. the European Money Laundering Directive). Although resorting to this type of international instrument sometimes obfuscates the penal aspects of the law, these aspects are nevertheless present. From the analysis in this chapter, it is to be expected that the future development of international law enforcement will move increasingly away from the traditional inter-

[465] Antoine, above n 461.

government type of conventions and will use other types of international soft law instruments.[466]

[466] Stessens, above n 355, 27-8.

Chapter 5: Responses of Offshore Financial Centres

5.1 Introduction

The previous chapters have examined the directives of the supranational organisations and the four major issues which lead to the analysis in this chapter of the responses of the OFCs. Throughout this chapter, it will be demonstrated that the basis for the assertions made by the OFCs towards the OECD are balanced and supportive. The OECD 2001 *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*[467] report was not well received by the OFCs and their displeasure was first made apparent at the January 2001 forum, at the High Level Consultations on OECD Harmful Tax Competition Initiative. The OFCs asserted that the dialogue with the OECD was not carried out on equal terms.[468] Serious ideological differences emerged between offshore and onshore nations on the question of tax policy and the use of offshore confidentiality in upholding such policies. But, the voices of offshore nations, most of which are SDEs, can hardly he equated with those of the OECD countries. Indeed:[469]

> there is significant inequality of negotiating power. The OECD Member countries are the most powerful countries in the world, who, through the OECD are now acting in unison. By contrast, the 'tax haven' countries are

[467] Organisation for Economic Cooperation and Development, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (2001 OECD).
[468] Stikeman Elliot, 'Towards a Level Playing Field - Regulating Corporate Vehicles in Cross-Border Transactions', (2002) A Review Commissioned by the International Tax and Investment Organisation (ITIO) and The Society of Trust and Estate Practitioners.
[469] Gaffney, above n 125, 307.

small jurisdictions with little or no political co-ordination who are often the subject of vilification in the international media.

The evident irony is that whereas offshore investment arises out of purely voluntary conduct of individuals and businesses internationally, responding to the attractive fiscal and legal environments of offshore countries, the OECD's challenge is 'essentially coercive action'.[470]

> In practice, this means applying political pressure and seeking to intervene in the international affairs of other jurisdictions, which normally calls for some form of justification or defence on the grounds of public international law.

The analysis in this chapter will show the shortcomings of the OECD arguments of harmful tax practices as presented in Chapters 2 and 3, and will highlight at least one major issue in the apparent bias of the OECD report in favour of developed countries and more developed offshore jurisdictions, in particular, those associated with developed countries such as the UK dependencies. For example, although financial centres in London or New York offer tax incentives to, or accept investments from non-residents wishing to avoid taxes in a similar manner to offshore jurisdictions, they have neither been admonished nor threatened with sanctions. It is the small developing offshore centres, particularly in the Caribbean, which have been the main target of the OECD by being named in the various 'blacklists', despite the fact that such countries (Cayman Islands, Bahamas, British Virgin Islands) have similar or

[470] Ibid.

even identical laws and legal policies to other 'better protected' offshore jurisdictions and even some onshore ones.

As previously noted, the proposals required that low-tax regimes make many concessions or face penalties for being 'non-cooperative'. Although, the same harsh standard was not recommended for OECD member states.

> "They are being asked to make changes, ... but there are no specific penalties ... Similarly, the OECD is using a double standard in its campaign against privacy ... Switzerland, for instance, has refused several times to abolish financial privacy ... Luxembourg, Belgium and Greece, ... also have indicated a reluctance to phase out financial privacy. Yet none of these nations are being threatened with financial protectionism from other countries."[471]

Further, many OFCs complained that the OECD had not bothered to find out about the actual workings of their offshore systems. Some of the demands being made by the OECD would inevitably result in the demise of the offshore financial sector. Many offshore nations feel that this is simply too high a price to pay, particularly as their economies are being threatened by other forces of globalisation such as liberalisation and unhindered free trade.[472] The incompatibility of the OECD initiative to such free trade policies has not been overlooked by the OFCs.

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471 Nor accused of money laundering. See Daniel J. Mitchell, Low-Tax Jurisdictions Are Not Money Laundering Havens - Center for Freedom and Prosperity (2002) Cayman Net News Online < http://www.caymannetnews.com/Archive/Archive%20Articles/January%202002/Issue%20143/LowTax.html> at 7 November 2003.

472 A good example is the banana issue where the US challenged the preferential quota system between UK and the Windward islands in the Caribbean in the World Trade Organisation forum between 1995 and 2001.

OFCs were particularly concerned about reciprocity in the several areas in which demands for reform are being made. Whether it related to money laundering, identities of beneficial owners in companies and trusts, reporting requirements, offer of tax incentives to non-resident account holders, and similar matters, they insist that onshore financial systems also have similar demands placed upon them.[473]

5.2 Momentum Gathers

OECD membership, as previously noted, is seemingly dominated by wealthy, developed nations. The dominant states in that group are the principal participants in the market for cross-border financial services. At the same time, these states control the process for regulatory reform. The OECD claims to seek a level playing field for the regulation of all jurisdictions. However, it is argued by the OFCs that, the OECD is unlikely to be an impartial referee in regulating a market where its Member countries have a significant commercial interest.[474] The US Government's position, for example, is articulated in a 2002 US Treasury report on corporate inversions as follows:

> Our overarching goal must be to maintain the position of the United States as the most desirable location in the world for place of incorporation, location of headquarters, and transaction of business.[475]

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[473] Antoine, above n 465, 320-2.
[474] Stikeman Elliot, above n 468.
[475] Corporate Inversion Transactions: Tax Policy Implications, May 2002, p. 30.

Hence any jurisdiction, quite understandably, will seek to protect its commercial interests in redrawing the rules. Hence there is unease with a process for change controlled by a subset of market participants.

5.3 Background

The non-OECD OFCs, financial services professionals, and SDEs support the OECD call for suppressing the misuse of corporate vehicles such as International Business Companies (IBCs). Non-OECD OFCs agree with the OECD that all countries offering platforms for the conduct of cross-border financial services carry an obligation to adopt effective regulation to interdict financial crimes and other illicit activities including money laundering and the financing of terrorism.[476]

It is argued that the need to provide information to support cross-border enforcement of tax liabilities is less self-evident, even though there is no precedent in international law for the imposition of unilateral obligations on one country to assist another in its efforts to collect tax. Proposals for changing practices in the tax information exchange area are accordingly sensitive, and require careful consideration. Non-OECD OFCs acknowledge that conventional rules for information exchange for tax purposes are evolving and small and developing countries seek to participate in the process of setting new policy and standards.[477]

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[476] The OECD purports to aim to combat the use of corporate vehicles for illicit purposes which includes "money laundering, bribery/corruption, hiding and shielding assets from creditors, illicit tax practices, self-dealing/defrauding assets/diversion of assets, market fraud and circumvention of disclosure requirements, and other forms of illicit behaviour". See Organisation for Economic Cooperation and Development, above n 467, 7.

[477] Stikeman Elliot, above n 474.

Non-OECD OFCs agree that in order to effectively combat transnational crime, information on beneficial ownership and control must be obtainable by authorities within the jurisdiction in which corporate vehicles are established, through means appropriate within the particular jurisdictional context. Non-OECD OFCs concur that this information must be subject to exchange in agreed circumstances. However, the design of new rules to facilitate cross-border exchange of information must evolve through a consensual process including the following elements:[478]

- establishment of a level playing field (i.e. all countries must be subject to the same rules for the same activities, implemented on the same timetable and with the same consequences for non-cooperation);
- discussion of issues in a universal forum which includes all jurisdictions offering facilities that may be affected by the outcome;
- appropriate regard to competing considerations, such as reasonable financial privacy; and
- the adoption of regulations which are proportionate and risk-based so that the restrictions on legitimate commerce are appropriately balanced against the harm sought to be curtailed.

5.3.1 Methodology Adopted

The OFCs responded with the report entitled, *Towards a Level Playing Field - Regulating Corporate Vehicles in Cross-Border Transactions'* ('Level Playing Field'). A Review Commissioned by the International Tax and Investment Organisation

[478] Ibid.

(ITIO)[479] and The Society of Trust and Estate Practitioners, it was based on a survey of the existing legislation and regulatory framework in a broad cross section of fifteen countries representative of the jurisdictional participants in the provision of cross-border financial services, including both so called "onshore" and "offshore", civil and common law, large and small, OECD member and non-OECD member countries. The fifteen jurisdictions reviewed were The Bahamas, Bermuda, British Virgin Islands, Canada, Cayman Islands, Hong Kong, Ireland, Isle of Man, Jersey, Luxembourg, New Zealand, Singapore, Switzerland, the United Kingdom (or England and Wales, as appropriate) and the United States (focusing on the state of Delaware).

This "Level Playing Field" report also draws upon existing analytical and statistical work on the formation and regulation of corporate vehicles, including work conducted by the EU, the United States General Accounting Office (GAO), the US Senate and Treasury, the Bank for International Settlements (BIS), the FATF and the OECD. It was in reply to OECD's "*Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*" report[480] ('The OECD Report').

5.4 Key Concerns with the OECD Report

5.4.1 Summary of Issues

The main concerns that Non-OECD OFCs have with the OECD Report are:[481]

(i) the OECD Report focuses on Non-OECD OFCs to the exclusion of the OECD's own members, which account for 80 per cent of the global trade in financial services;

479 See Appendix T for a list of the ITIO members.
480 Organisation for Economic Cooperation and Development, above n 476.
481 Stikeman Elliot, above n 478.

(ii) the proposals in the OECD Report were developed in a process controlled by a subset of market participants; and (iii) the dangers of compromising individuals' privacy were not sufficiently considered.

(a) Primary Focus on Non-OECD OFCs

The OECD adopted an express focus on vehicles established in "offshore" jurisdictions which were not OECD Member States. This limits the utility of the report as OECD Member countries already control 80 per cent of the global "offshore" market – i.e., the trade by jurisdictions in financial services provided to non-residents.[482] The restricted focus is curious, particularly as the initial report of the FSF acknowledged difficulty in distinguishing so-called "offshore activity" within the major developed states from that in smaller and developing states.[483] There are well documented concerns relating to vehicles established or administered in OECD Member States, as discussed below;

[482] See the following for discussion of the distribution of the provision of cross-border financial services in both OECD and non-OECD Member States: R Biswas, 'Introduction: Globalisation, Tax Competition and Economic Development' in R Biswas (ed), *International Tax Competition: Globalisation and Fiscal Sovereignty* (2002).

[483] The FSF defined "offshore" in their Report of the Working Group on Offshore Centres, 5 April 2000, as follows:

> An OFC is not easily defined. Any jurisdiction can be considered "offshore" to the extent that it is perceived as having a more favourable economic regime than another, e.g., low corporate tax rates, light regulation, special facilities for company incorporation, or highly protective secrecy laws. While OFCs are commonly perceived to be small island states, a number of advanced countries have succeeded in attracting very large concentrations of non-resident business by offering economic incentives either throughout their jurisdiction or in special economic zones.

Switzerland, which is an OECD and FATF Member, criticised the final outcome of the FSF process on the basis that:

> the (FSF) list was drawn up in a non-transparent manner and does not list several financial centres with a high proportion of international financial business (e.g. New York, London) as Offshore Financial Centres. (Swiss Federal Department of Finance, Swiss Financial Centre: A Documentation, July 2001 at page 8).

The OECD justified the focus on non-OECD OFCs, as follows:[484]

- some OFCs are perceived to provide "excessive secrecy" and "create a favourable environment" for the misuse of such vehicles;
- a disproportionate share of companies in the "offshore" world are shell companies; and
- recent improvements in some non-OECD OFC regimes may provide models for other non-OECD OFCs.

As the analysis which follows shows, the first two concerns are clearly not confined to structures established in non-OECD Member States and the third rationale could also apply to non-OECD OFC regimes providing more rigorous models for some OECD OFC regimes.

The ITIO argues that the adoption of a perspective limited to offshore centres mars the OECD Report, undermining its objectivity and limiting the value of its conclusions. Non-OECD OFCs perceive mixed motives in the OECD's process and proposals.[485]

(b) Disproportionate Regulatory Burdens

Regulation consumes resources in the form of direct financial costs and the transaction friction occasioned by satisfaction of compliance obligations. Appropriate regulation is generally accepted to be proportionate to the risks and benefits associated with the activity being regulated. Disproportionate and excessive

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484 Organisation for Economic Cooperation and Development, above n 480, 17.
485 Stikeman Elliot, above n 481.

regulation applied selectively to particular market participants burdens those participants with a competitive disadvantage. In an efficient market, unevenly applied regulatory burdens shift demand from one service provider (or jurisdiction) to another, as users search for a cost-efficient, low friction service. Regulatory limitations on services offered (i.e. financial privacy) also shift demand.

States controlling the design process have the opportunity to assert their objections to particular forms of increased regulation at the design stage, in the non-transparent policy formulation process, and work out a rationale for self-exemption (or "outsider-burdening") before proposals are formally tabled. Non-OECD jurisdictions find themselves portrayed as unco-operative by those controlling the process when excluded jurisdictions object to an opaque process.[486]

(c) Erosion of Privacy

The collection and sharing of the complete record of an individual's financial transactions, and the linkage of databases through the use of electronic tools, poses many concerns for the privacy of individuals and vehicles treated as corporate by the OECD Report.

The UN Declaration of Human Rights recognises and protects privacy as a basic human right.[487] The OECD also accepts that individuals and vehicles treated as corporate by the OECD Report have legitimate expectations of privacy and business

[486] Ibid.
[487] The UN Declaration of Human Rights 1948 provides as follows in Article 12:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks.

confidentiality in their affairs. The OECD notes that "corporate entities, in particular, have a valid right not to have their affairs disclosed to competitors, customers, and suppliers among other things".[488]

The OECD report on "Improving Access to Bank Information for Tax Purposes",[489] contains informative insights into the scope of existing financial disclosure in OECD Member States. France, for example, requires financial institutions managing stocks, bonds or cash to report to the Government on a monthly basis regarding the opening, modifications and closings of accounts of all kinds. This information is stored in a central computerised database which is used by French authorities for research, control and collection purposes. Four other OECD countries also maintain centralised databases, namely Hungary, Korea, Norway and Spain.[490]

The public is doubtful of the ability of governments to maintain data security[491] or to resist the temptation to access information for political, economic or other purposes, particularly as there is, by definition, no opportunity to monitor unauthorised access.

[488] Organisation for Economic Cooperation and Development, above n 484, 47.
[489] Organisation for Economic Cooperation and Development, above n 451.
[490] The UK Inland Revenue internet self-assessment service was suspended in May 2002 following security breaches. Users found they could examine other people's tax data on the UK Inland Revenue website. ("Revenue Offline" *Financial Times*, 11 June 2002 and "No Date for Return at Online Revenue Service", *Financial Times*, 6 June 2002).
[491] Ibid. The US IRS has also been admonished for its failure to adequately secure access to its electronic filing systems and the electronically transmitted tax return data those systems contain. In a report dated February 2001 titled Information Security: IRS Electronic Filing Systems the US General Accounting Office states at page 2:

> We demonstrated that unauthorised individuals, both internal and external to IRS, could have gained access to IRS' electronic filing systems and viewed and modified taxpayer data contained in those systems during the 2000 tax filing season. We were able to gain such access because the IRS at that time had not (1) effectively restricted external access to computers supporting the e-file program, (2) securely configured the operating systems of its electronic filing systems, (3) implemented adequate password management and user account practices, (4) sufficiently restricted access to computer files and directories containing tax return and other system data, or (5) used encryption to protect tax return on e-file systems. Further, these weaknesses jeopardised the security of sensitive business, financial and taxpayer data on other critical IRS systems that were connected to e-file computers through its service-wide network.

Affluent taxpayers in at least one major OECD member country also fear that tax data is routinely sold to criminal gangs seeking targets for kidnapping, common in that state.[492]

It can be argued that global sharing of information means that criminal access can occur at the weakest point of entry, multiplying the risks associated with unauthorised disclosure.[493]

The risks to personal privacy arising from the collection of financial information are disconcerting. The prospect of abuse where these vast and globally converged pools of information fall into the wrong hands en masse or through ad hoc unauthorised access is a major concern. This is particularly so for the many families with direct experience of repressive or corrupt governments.

Flaws in existing information exchange programs and those proposed have insufficient safeguards to ensure that information obtained and shared is safeguarded against inappropriate use, including human rights violations. A report by the US based Task Force on Information Exchange and Financial Privacy identifies the danger that information may be provided to countries which have one or more of the following

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[492] The US State Department warns of widespread kidnapping in Mexico in the following terms:

> Kidnapping, including the kidnapping of non-Mexicans, continues at alarming rates. So-called "express" kidnappings, an attempt to get quick cash in exchange for the release of an individual, have occurred in almost all the large cities in Mexico and appear to target not only the wealthy, but also middle class persons.
>
> US Department of State, Bureau of Consular Affairs, Mexico (2004) <http://travel.state.gov/mexico.html> at 10 July 2004.

[493] A UN Report published in 1998 notes, alarmingly, that in a part of the former Soviet Union (not an OECD member), criminal gangs bought banks in order to determine which families had bank accounts large enough to make kidnapping worthwhile. United Nations Office for Drug Control and Crime Prevention (UNODCCP), Financial Havens, Banking Secrecy and Money Laundering, Double issue 34 and 35 of the Crime Prevention and Criminal Justice Newsletter, and Issue 8 of the UNDCP Technical Services, 1998 at page 68.

characteristics: major corruption problems; hostility to the West; or past sponsorship of terrorism.[494]

According to Tanzi and Zee, information exchange agreements cannot be left self-enforcing as the national interest would seem to lie in not sharing information, so strengthening its location for investors.[495] This is simply to secure national advantage, whether it is in terms of tax revenue, banking business, tourism or others. Even if there are agreements in place, there is under-supply of information as the incentive of national advantage and foreign investment will outweigh and defeat the purpose of the information exchange agreements.[496]

It is essential to ensure that the countries receiving information have safeguards in place in order to protect human rights and to ensure that information is not used for purposes (e.g. political or commercial gain) other than that which the information was originally provided for.

Legal systems throughout the world have different penalties for tax evasion, money laundering and other financial crimes. China, for example, is known to have sentenced an individual to death for tax evasion.[497] Information exchange programmes must take

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494 Task Force on Information Exchange and Financial Privacy, Report on Financial Privacy, Law Enforcement and Terrorism, 25 March 2002.

495 Vito Tanzi and H H Zee, 'Can Information Exchange be Effective in Taxing Cross-Border Income Flows?' in K Andersson, P Melz and C Silfverberg (eds), *Modern Issues in the Law of International Taxation* (2001).

496 In contrast, Eggert and Kolmar (2002) find that countries may voluntarily choose to share information fully, but in their context there is no particular benefit to any country, whether in terms of tax revenue or banking business from attracting inward investment, so that the basic problem essentially vanishes. W Eggert and M Kolmar, 'Information Sharing, Multiple Nash Equilibria, and Asymmetric Capital-Tax Competition' (EPRU Working Paper Series No 02-01 (Economic Policy Research Unit, 2002).

497 www.amnesty.org.il/urgent/5201PRC.html, August 2001.

such differences into account to permit countries to choose whether they will provide a jurisdiction with information that may lead to a cruel and unusual punishment.

5.4.2 Weaknesses in OECD Process

(a) Lack of Universal Forum

The ITIO argues that the basic equity and effective long-term implementation require that the concerns and interests of all stakeholders should be taken into consideration in the development of standards. Whilst the OECD maintains to seek, in principle, a more inclusive forum. Jeffrey Owens, OECD Head of Fiscal Affairs puts the position as follows:[498]

> The important thing is that as many people as possible have a seat at the table in setting what the rules would be. I see that as a general trend in a lot of our work. We must be opening up; we must become more inclusive; we must not just be inviting the countries to come and listen to what we have to say, but we've got to be inviting them and saying, "You are here as partners. We're interested in what your views are, and your views will shape things that come out of the OECD".

Many small and developing jurisdictions, including non-OECD OFCs, would welcome such a universally accessible process for policy formulation. However they perceive that the current reality does not reflect this proposed change in direction. The

[498] Cordia Scott's conversation with OECD's Jeffrey Owens on the environment, e-commerce, and falling tax rates. Maryam Enayat, *Tax Bits International: Free Bulletins* (2001) Tax Analysts <http://www.tax.org> at 10 July 2004.

exclusive use of expert representatives from OECD Member States to assess the rules of non-member states, discussed below, illustrates their concerns.[499]

(b) Lack of Expert Advice Outside OECD

In drafting the OECD Report, the OECD Steering Group on Corporate Governance established an ad hoc group consisting of persons from twelve OECD *Member countries*.[500] Despite this expertise, the OECD focused their attention on *non*-OECD jurisdictions with supposedly only cursory comments on their own members' regimes.

The provision of cross-border financial services is a highly competitive and lucrative business. It is important to the OECD Member States and vital to the development plans of many small and developing countries which lack natural resources and other opportunities. In such a competitive environment, policy formulation must be premised on transparent comparison of the regulatory systems in market participants. In the OECD Report, this was not done according to the non-OECD OFC's.[501]

(c) Uneven Playing Field

Without the goal of a level playing field, it might be argued that business will simply migrate to those jurisdictions overlooked or excused from compliance with the new

[499] For example with regards to the OECD Harmful Tax Practices initiative, the classification of jurisdictions as tax havens was effected by the OECD without reference to those targeted. Subsequently, the acceptability or otherwise of a commitment demanded by the OECD and given by any of those jurisdictions was determined exclusively by the OECD. Only after such a commitment is deemed acceptable is that jurisdiction invited to join the Global Forum which will determine the implementation plans and the form of exchange of information agreements to be utilised by all those jurisdictions going forward.

[500] Organisation for Economic Cooperation and Development, above n 488, 16.

[501] Ibid. The methodology used in the report did not include explicit co-operation and participation of the non-OECD OFCs.

rules.[502] In such circumstances, it will also be difficult to secure the trust and co-operation of the many jurisdictions which need to work together to reform the regulation of the international financial system. The OECD had expressed a commitment to a level playing field in the context of its Harmful Tax Practices project,[503] though this commitment does not appear to have yet translated into a process which is likely to realise this goal. Some member states of the OECD have acknowledged that non-OECD jurisdictions should not be required to implement access to information processes which one or more of the OECD member states are not willing to implement.[504]

In the context of the Harmful Tax Practices Initiative the OECD showed inappropriate reluctance to permit the implementation of commitments by non-OECD Member States to be conditioned on the implementation of equivalent commitments by all OECD Member States, including Switzerland and Luxembourg. The OECD's response that their reports on that initiative were already endorsed by member countries was unconvincing whilst Switzerland and Luxembourg continued to abstain from the 1998 Report on Harmful Tax Practices.[505] In the OECD 2001 Progress

[502] Edgar, above n 356, 1092.

[503] In Towards World Tax Cooperation, OECD Observer, 27 June 2000, Jeffrey Owens, OECD Head of Fiscal Affairs reviewed the OECD's demands for transparency in the Harmful Tax Competition initiative and stated:

> And let me emphasise that the same standards will apply to all [OECD] Member countries and non-Member countries.

[504] UK Treasury, Exchange of Information and the Draft Directive on Taxation of Savings, February 2000 states at 4.7:

> Countries identified by the OECD as tax havens will quite properly expect EU and other OECD Member countries to meet at least the same standards of effective exchange of information including access to, and exchange of bank information for, tax purposes, as they themselves are expected to meet under the Harmful Tax Practices Initiative.

[505] Organisation for Economic Cooperation and Development, above n 267.

Report on the project, Switzerland and Luxembourg were joined in their abstentions by Portugal and Belgium.[506]

The OECD's choice to focus on non-OECD OFCs or non-Member countries in the OECD Report undermined the confidence of objective observers that the OECD genuinely sought a level playing field. For the OECD to effectively achieve their goals relating to transparency and information exchange it was essential that all countries, both "onshore" and "offshore", OECD Member states and non-OECD Member states were part of the process and "buy in" at the same time, and so supported the project through co-operation and co-ordinated effort. Without this, SDEs continue to perceive the OECD as intending to use the camouflage of a regulatory thrust to implement non-tariff barriers to the trade in services and so undermine their competitive position.

5.5 Benchmarking the OECD's Conclusions

5.5.1 Corporations

The OECD stated that the corporation is open to misuse due to its separate legal personality and the ability to obscure the identity of the beneficial owner. International Business Companies (IBCs) and exempt companies are correctly singled out for attack on the alleged basis that their combination of effective anonymity and little or no supervision makes them more susceptible to misuse.[507] Only passing mention is given to functionally equivalent commercial vehicles in OECD Member

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[506] Organisation for Economic Cooperation and Development, *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* (Paris: OECD, 2001).
[507] Organisation for Economic Cooperation and Development, above n 501, 22.

countries raising similar concerns. For example, the OECD notes without comment, a study conducted by the Performance and Innovation Unit of the UK Cabinet Office which indicated that UK shell companies have been involved in almost all complex UK money laundering schemes.[508]

(a) Bearer Shares

Again, the OECD notes that "the ability to obscure identity is crucial for perpetrators desiring to commit illicit activity through the use of corporate vehicles".[509] The OECD indicates that the primary instruments used to achieve anonymity are bearer shares, "corporate" directors and chains of corporate vehicles.[510]

In the fifteen OECD Member States and OECD non-Member States surveyed in the Level Playing Field report, hearer shares and "corporate" directors were permitted in more OECD countries than non-OECD countries studied. Bearer shares were permitted in six out of seven OECD countries but only four out of eight non-OECD countries (Hong Kong and Singapore which are FATF Members included).[511]

Although the issuance of what are styled as "bearer shares" is technically permitted in several non-OECD OFC jurisdictions, in the Cayman Islands bearer shares are not permitted unless they are subjcct to custodial arrangements with a recognised

[508] United Kingdom Cabinet Office Performance and Innovation Unit, Recovering the Proceeds of Crime, June 2000.
[509] Organisation for Economic Cooperation and Development, above n 507, 29.
[510] Ibid 29-32.
[511] Stikeman Elliot, above n 485, 18.

international custodian or licensed Cayman Island entity.[512] In the British Virgin Islands the government has made a public commitment to amend the *International Business Companies Act* to "immobilise" bearer shares.[513] Such immobilised shares are not transferable by delivery and the owner is centrally tracked by the custodian. For owner identification purposes this puts such shares on a similar footing as registered securities.

(b) Disclosure of Beneficial Ownership

Disclosure of beneficial ownership information refers to those rules which are aimed at identifying the physical persons who are either entitled to the assets of the vehicle or are actually in control of the structure and its activities.

Once again, the OECD's focus on non-OECD OFCs was not helpful in the context of the availability of information on beneficial ownership. An October 2001 report financed by the European Commission concerning transparency and money laundering in EU member states ("the Transcrime Report") identified corporations in EU Member States as structures susceptible to being used in money laundering operations. The report noted:[514]

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512 'Trident Trust Cayman Islands: Custody of Bearer Shares' Trident Trust <http:// www.tridenttrust.com/ PDFs/Cayman_Bearer_Shares_Memo.pdf> at 28 April 2004.

513 International Business Formation Inc, 'Changes in the British Virgin Islands Concerning Bearer Shares and Director Requirements' (2003) <http://www.ibcf.com/news/news050503-BVI-bearer-shares.html> at 28 April 2004.

514 Research Centre on Transnational Crime – University of Trento, *Transparency and Money Laundering: Study of the Regulation and its Implementation in the EU Member States, that obstruct Anti-Money Laundering International Co-operation* (2001 Research Centre on Transnational Crime – University of Trento) 8.

> The main obstacle [to anti-money laundering co-operation in EU member states] is the lack of regulation requiring full information on the real beneficial owner of a public or private limited company, especially when a legal structure is a shareholder or director, or the issuance of bearer shares is permitted. Furthermore, some problems seem to arise from the fact that, in some EU Member countries, the regulation allows for nominee shareholders and directors.

While some basic shareholder information was available in most OECD Member countries benchmarked, the wide availability of bearer shares in most of the OECD Member States surveyed made discovery of the real beneficial owner next to impossible in these states. In the US state of Delaware, basic records of shareholders in private companies and related vehicles are not required to be kept by the state.[515]

(c) Filing/Auditing of Accounts

Public companies, in both OECD and non-OECD Member States, are generally required to file accounts with a regulator or the company registry and to have their accounts audited. Private companies are frequently exempt from requirements to file accounts with the corporate registry or from having accounts audited. Where a filing requirement does exist for a private company it may require the lodging of abbreviated accounts only. For example, in England and Wales both "small" and "medium sized" private companies are exempt from the requirement to file full accounts and unless a company's turnover exceeds £350,000 there is no requirement

[515] The Delaware Company <www.thedelawarecompany.com> at 3 November 2003.

to appoint an auditor[516]. In Ireland small private companies are required to provide an abridged balance sheet. New Zealand companies are not required to file accounts with the corporate registry, unless they qualify as a "non-exempt" company.[517]

(d) Regulation of Service Providers

One of the reasons advanced for the focus in the OECD Report on non-OECD OFCs was that such countries allegedly have weak supervisory and regulatory regimes.[518] In order to test this view the financial service providers were reviewed by ITIO to verify if they were regulated in each of the 15 jurisdictions surveyed.[519]

In general, the OFCs examined had a body or bodies responsible for regulating corporate service providers while the "onshore" jurisdictions surveyed (including Hong Kong and Singapore) do not generally regulate such service providers.[520] This was also noted by the IMF in its Progress Report on the offshore financial centre program as follows:[521]

> It should, however, be emphasised that the oversight of company service providers does not occur outside of OFCs, and there are no accepted standards on whether and, if so, how, they should be regulated.

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516 Section 242 of the Companies Act 1985 and Part VII of the Companies Act 1985.
517 Countries which have 25% or more foreign shareholding.
518 Organisation for Economic Cooperation and Development, above n 510, 17.
519 The fifteen jurisdictions reviewed were The Bahamas, Bermuda, British Virgin Islands, Canada, Cayman Islands, Hong Kong, Ireland, Isle of Man, Jersey, Luxembourg, New Zealand, Singapore, Switzerland, the United Kingdom (or England and Wales, as appropriate) and the United States (focusing on the state of Delaware).
520 Heritage Trust Group <http://www.heritagetg.com> at 3 November 2003.
521 International Monetary Fund, *Offshore Financial Centre Program: A Progress Report*, (2002) footnote 10.

Significant recent advances are evidenced in the regulation of service providers in most of the non-OECD OFCs, which now have expansive regimes for such regulation. For example, the Cayman Islands Monetary Authority[522] and the Financial Services Commission in the British Virgin Islands[523] are responsible for the supervision of financial services and regulate and supervise banking, collective investment, insurance business, investment business and trust and company service providers, as is also the case with the Jersey Financial Services Commission.[524]

The benchmarking process reported here demonstrated that the examined financial services sectors within OECD countries were often relatively unregulated or poorly controlled when compared to those now extant in the principal non-OECD OFCs.[525] The UK Treasury apparently shares this conclusion following recent comparisons of corporate regulation in certain offshore centres with that in the UK.[526]

(e) Case Study: Delaware LLCs and Corporations

The United States of America is home to the largest financial services markets in the world. It is a well regulated jurisdiction with a long history of leadership in the

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[522] Cayman Islands Monetary Authority <http://www.cimoney.com.ky> at 3 November 2003.
[523] 'Financial Services Commission Holds First Board Meeting', *Islands Sun Newspaper* (British Virgin Islands), 7 June 2002.
[524] Jersey Financial Services Commission <http://www.jerseyfsc.org> at 3 November 2003.
[525] Stikeman Elliot, above n 511.
[526] The UK Treasury paper entitled Regulatory Impact Analysis Disclosure of Beneficial Ownership of Unlisted Companies, July 2002 at 3.11.9. notes as follows:

> Whilst the UK regime has been praised for its business friendliness and pragmatism in attracting foreign companies to establish themselves here, it also has its critics at home and abroad. Indeed, centres once considered disreputable by UK standards now have stricter company regulation, in certain respects, than the UK (see, e.g. the Jersey and Bermudan laws on beneficial ownership). Thus the current system raises issues of how to balance the interests of the national economy and international leadership.

regulation of financial services, and is a model for other jurisdictions.[527] However, state governments within the US are not parties to agreements struck by the federal government with the OECD and other supranational agencies. States within the US facilitate establishment of corporate entities which do not meet regulatory standards established by these agencies.

The potential for non-tariff trade barriers has promoted unease among clients of financial centres established in SDEs. Some states within the OECD, including the US, have created and then exploited this uncertainty in promoting their own anonymous tax-free facilities which compete directly with those in non-OECD "offshore centres".[528]

The single member Delaware LLC competes directly with an International Business Company (IBC) and is ubiquitous in the "offshore" world. There are more than 300,000 corporations established in Delaware.[529] Where the LLC is established by a non-US person for non-US activity, it is free from any US tax reporting, exposures or filing requirements. No changes increasing the regulation applicable to this vehicle paralleling those now applicable and proposed for IBCs are in prospect for Delaware corporations. Delaware law does not require the local corporate service provider to obtain beneficial ownership information on establishment of the company; only the name of the person requesting the company is required. In many cases, the "customer"

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[527] The Uniting and Strengthening America by Proving Appropriate Tools Required to Intercept and Obstruct Terrorism enacted on October 26 2001, the Money Laundering Control Act of 1986, the Bank Secrecy Act (BSA) of 1970 which covered the Currency Transaction Report, and the Suspicious Activity Report was included in the BSA in April 1996.

[528] For example, in an article promoting tax-free trusts established in the US entitled "Trust US" appearing in the FT Expat the author states that:

> The US has considerable advantages over traditional offshore financial centres as a trust jurisdiction. Unlike traditional "tax havens" and offshore financial centres, the US is above suspicion by European tax authorities.

[529] State of Delaware, Division of Corporations <http://www.state.de.us/corp> at 3 November 2003.

requesting the company will be a wholesaler of corporate shell companies located in another country so no data will be collected on the beneficial owners.

Delaware LLCs can be formed in two hours for US$500.[530] The Delaware Government staffs its corporate registry until midnight. The anonymity conferred by a Delaware LLC is widely touted by the private sector, including to non-US clients.[531] The website for the Secretary of State for Delaware describes the jurisdiction as *The Incorporating Capital of the World.*[532]

Concerns arising from the use of Delaware corporations in the offshore market were authoritatively documented by the US General Accounting Office in a report tabled in October 2000 entitled *Suspicious Banking Activities: Possible Money Laundering by U.S. Corporations Formed for Russian Entities* (the "GAO Report"). The report was commissioned by Senator Carl Levin as background research for the US Senate Commission on Suspicious Banking Activity. That Commission published a Report on Correspondent Banking in February 2001 to focus public concern on the dangers posed by poorly regulated offshore companies and banks.[533]

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[530] State of Delaware, *Fee Schedule* (2004) Division of Corporations – Filing and Certification Fees <http://www.state.de.us/corp/fee.shtml> at 13 July 2004.

[531] Delaware Corporate Agents Inc, *Why Incorporate or Form a Limited Liability Company in Delaware?* <http://www.delcorp.com/ydecorp.htm> at 3 November 2003 and Harvard Business Services Inc, *Delaware Incorporation Information* <http://www.delawareinc.com/llcintro.html> at 3 November 2003.

[532] Delaware also has considerable appeal to US and other OECD based incorporators as well. Enron, for example, established 675 of its 2000 corporate vehicles in the state (see "Delaware and Enron" by Brian Naylor, National Public Radio, 7 March, 2002.) Enron's use of non-US companies has attracted much adverse media comment, though its numerous incorporations in Delaware appear to have largely escaped notice or comment.

[533] Minority Staff of the Permanent Subcommittee on Investigations, Report on Correspondent Banking A Gateway for Money Laundering, 5 February 2001.

The GAO Report detailed the establishment of Delaware corporations for thirty to fifty Moscow-based brokers of corporate shells. The service provider, Euro-American Corporate Services Inc., sourced its business through a Russian shareholder and director. The GAO noted that this individual "had a close relationship with companies associated with members of the former Soviet Union's intelligence agency".[534] This Russian individual was also a director of a US bank, Commercial Bank of San Francisco. This US financial institution opened bank accounts for the Delaware corporations established by Euro-American without any independent due diligence.[535]

The GAO documented the establishment of more than 2000 Delaware companies for Russians over the period from 1997 to 2000. The companies were formed in blocks of 10 to 20 at a time, and sold to Russian corporate brokers, who sometimes sold the shell companies to others who, according to the GAO Report, may also have sold them again.[536]

The GAO notes that a Euro-American employee indicated that "Euro-American conducted no due diligence with respect to any company it incorporated because state law does not require it".[537] Delaware law requires no filing of financial information as a corporate matter, nor is any required for tax purposes, where companies are not subject to US tax.

Euro-American rented an office in Delaware although no one physically occupied the premises. Telephone calls and mail were forwarded to an office of Euro-American

[534] United States General Accounting Office, Suspicious Banking Activities: Possible Money Laundering by U.S. Corporations Formed for Russian Entities (2000 GAO) 10.
[535] Ibid 11.
[536] Ibid 6.
[537] Ibid 7.

outside the state. Despite a presence in the state described by Euro-American as a mere "formality"[538], the GAO was advised by an official of Delaware's Division of Corporations that the virtual presence complied with Euro-American's obligations as a Delaware registered incorporation agent.[539]

Two US banks opened a total of 236 bank accounts for these companies with no due diligence beyond Euro-American's assurances that it had investigated the companies. On investigation the GAO was informed that the bank accounts were used to "move money out of Russia".[540] The GAO tracked $1.4 billion wire transferred to such accounts, usually from outside the US. Most of the funds were transferred out shortly after receipt to other foreign accounts. The GAO concluded that "these banking activities raise questions about whether the US banks were used to launder money".[541]

No information of any kind was obtained about the shareholders of the Delaware companies, and there was no requirement to provide financial information. There was no apparent prospect of retrieving such data by an investigative system or in any other fashion, since the chain of resellers and the ultimate user of the company would be unknown to Euro-American in its capacity as the Delaware service provider.[542] In any event, Euro-American maintained no substantive presence in the State and was not apparently amenable to effective supervision.

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538 Ibid 7.
539 Ibid.
540 Ibid.
541 Ibid 2.
542 Ibid 7. "According to the president of IBC and the Euro-American employee, Euro-American conducted no due diligence with respect to any company it incorporated because state law does not require it."

The absence of any of the elements of information which the OECD insists must be available in Non-OECD OFCs is standard practice under Delaware's current regime for incorporation.

The GAO summarised their report on the Delaware companies in question as follows:

> It is relatively easy for foreign individuals or entities to hide their identities while forming shell corporations that can be used for the purpose of laundering money.[543]

The US Senate Commission report on suspicious banking activity tabled in February 2001 made no reference to the GAO report, despite having requested the Report and receiving it in October 2000.

Given the GAO's conclusion and that the OECD's expert group was presumably aware of the GAO Report, Stikeman Elliot asserts that two alternative explanations may exist for why the OECD did not choose to comment substantively on Delaware LLCs in the OECD Report. The first is that the assumptions in the OECD Report are wrong and that therefore the OECD judged that the risk of illegal activities using standards exemplified hy the existing regulatory regime for Delaware LLCs does not justify increasing the regulatory burden for Delaware LLC's when to do so might undermine the competitive position of Delaware LLCs as the vehicle of choice for the large market share of international business now held by Delaware. The second alternative is that the assumptions in the OECD Report are correct but that multiple

[543] Ibid 11.

standards are being advanced by the OECD with non-OECD jurisdictions being expected to bear more onerous burdens in order to displace the relatively small amount of international financial services business which these jurisdictions currently provide.[544]

(f) Case Study – Luxembourg 1929 Holding Companies

Luxembourg is an OECD Member with a long established and very large international finance centre which competes directly with many non-OECD IFCs. Luxembourg has a corporate regime to encourage the incorporation of companies that hold and manage shareholdings in other companies. These companies are prohibited from carrying on industrial or commercial activities, establishing offices open to the public and holding real estate. As of January 1998 there were 13,700 such companies with subscribed capital of approximately EUR 31 billion.[545] Given that this amount reflects only subscribed capital, the total value of these companies is no doubt significantly higher.

A 1929 Holding Company is exempt from all corporate taxes in Luxembourg, except for a 1% tax on subscribed share capital and an annual subscription duty of 0.2% on the par value of the company's shares. There is no withholding tax on dividends paid by the company and no tax in Luxembourg on liquidation.[546]

Although a 1929 Holding Company must have a registered office in Luxembourg and file abridged audited financial statements (which do not contain details of the

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[544] Stikeman Elliot, above n 525.
[545] The Luxembourg "1929" Holding Company and the "Société de Participation Financiére", publ Luxembourg: KPMG Financial Engineering, 2000, p. 4.
[546] Stikeman Elliot, above n 544.

composition of the portfolios held by the company), there is limited public information available on 1929 Holding Companies. The founding shareholders are identified in the Articles of Incorporation of the company which are registered with the "Administration de l'Enregistrement" and filed with the Companies' Registrar. Nominee shareholders are permitted, as there is no obligation to file beneficial ownership information. Furthermore, a 1929 Holding Company can issue bearer shares which are freely transferable by the physical transfer of a share certificate. Thus, after incorporation it may become difficult if not impossible to identify the beneficial owner(s) of the company. 1929 Holding Companies may have nominee directors as well as corporate directors and a corporate secretary. There is no requirement for directors to be resident in Luxembourg. There is accordingly, little information readily available to the Luxembourg authorities on beneficial ownership and control of 1929 Holding Companies.[547]

Luxembourg has fiscal and banking secrecy laws. In the international fiscal context, the Luxembourg judicial authorities can only assist foreign tax authorities on matters relating to tax fraud but not civil or administrative tax matters.

The OECD Report notes that vehicles are subject to misuse where they enable individuals to hide their identity behind corporate forms and where "the capacity of the authorities to obtain and share information on beneficial ownership and control for regulatory/supervisory and law enforcement purposes" is constrained.[548] The OECD

[547] Robert den Hartog and George Deitz *Parliament to Pass Laws on Royalty Withholding Tax and 1929 Holding Companies* (2004) Deloitte <www.deloitte.com/dtt/cda/doc/content/lu_tax_050404(1).pdf> at 28 Apr 2004.

[548] Organisation for Economic Cooperation and Development, above n 518, 13.

Report does not address concerns regarding the susceptibility of the Luxembourg 1929 Holding Company to misuse.

As was the case in regard to the absence of substantive comment in the OECD Report regarding the Delaware LLC, Stikeman Elliot again asserts that two conclusions are possible in respect of Luxembourg 1929 holding companies. The first is that the regulatory regime in Luxembourg is appropriate to the risk and benefits associated with this segment of the financial services industry generally and that therefore the assumptions in the OECD Report are wrong. The second is that the OECD employs multiple standards in the OECD Report depending upon whether the relevant regulatory regime for a particular segment of trade in services is within an OECD Member State or in a competitor of OECD Member States.

5.5.2 Trusts

(a) Uses of Trusts

The OECD recognises the trust[549] to be an "important, useful, and legitimate vehicle for the transfer and management of assets".[550] Trusts are used to facilitate control and management of assets held for the benefit of minors and individuals who are incapacitated, for charitable purposes, for tax and estate planning and for supporting corporate transactions. The preservation of family assets through generations is the key for many individual settlors, particularly those with experience of repressive governments.

[549] Treated as a corporate vehicle for purposes of the OECD Report, which it is not.
[550] Organisation for Economic Cooperation and Development, above n 548, 25.

In the personal context trusts are used for the following:

- inter vivos and testamentary family trusts;
- trusts arising under wills and intestacies;
- estates under administration; and
- charitable trusts.

(b) The Nature of a Trust

The OECD Report examines trusts on the premise that the trust is a "corporate vehicle". This description is no doubt adopted for convenience, though it implies confusion over the fundamental nature of the trust concept.[551]

Trusts provide for a distinction between legal and equitable ownership. A trust has been defined as follows:

> A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any of whom may enforce the obligation.[552]

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[551] Ibid.

[552] Underhill and Hayton, *Law of Trusts and Trustees* (15th ed, 1995) 3. As they note, these sentences were expressly approved by Romer LJ in Green v Russell [1959] 2 QB 226 at 241, though they have been criticised as not being exhaustive. For example, developments in trusts in recent years are such that this definition may now be seen as too narrow; it does not include, for example, non-charitable purpose trusts.

As a matter of legal principle, an Anglo-Saxon trust is a relationship, not a contractual agreement as the OECD indicates.[553] It is not an entity or vehicle, as it is not a legal person.

The OECD Report notes the use of trusts primarily in English Common law jurisdictions,[554] overlooking the increasing recognition of the use of trusts in civil law jurisdictions. Whilst such countries may not have their own trust laws yet, some, such as Switzerland, actively conduct the administration of foreign law trusts. Countries which undertake such administration must therefore by definition be included in any analysis and should likewise be part of the process of setting the international standards.

The Hague Convention on the Law Applicable to Trusts and Their Recognition (1985) has been ratified by most jurisdictions with significant financial services sectors. Article II provides as follows:

> For the purposes of this Convention, the term "trust" refers to the legal relationships created...by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.[555]

A trust has the following characteristics:

(a) the assets constitute a separate fund and are not part of the trustee's own estate;

[553] Organisation for Economic Cooperation and Development, above n 551, 45.
[554] Ibid 25.
[555] Hague Conference On Private International Law, Convention On The Law Applicable To Trusts And On Their Recognition (Concluded July 1st, 1985)

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

The settlor's ability to choose to retain significant rights over assets transferred to a trust is, accordingly, widely accepted. The OECD Report states that "settlors attempting to evade taxes may transfer assets into a trust and then falsely claim that they have relinquished control over the assets"[556]. If a settler retains excessive control or a trust is not administered in accordance with its terms and its governing law, the trust is subject to challenge as invalid, or a sham. Trustees are aware of the risks of acting as the settlor's stooge and few will run the risk of a suit for breach of trust by disgruntled beneficiaries.

(c) Benchmark

One of the reasons given for the OECD's focus on Non-OECD OFCs was that such countries allegedly had weak supervisory and regulatory systems. Findings

[556] Organisation for Economic Cooperation and Development, above n 554, 26.

concerning the regulation of trustees[557] indicate that this allegation is incorrect, as it was also in the corporate service provider context.

Trust services providers are licensed or regulated, in all of the non-OECD jurisdictions examined with the exception of the Isle of Man, which is due to introduce regulation of trustees shortly. By contrast, most of the OECD jurisdictions do not regulate or license their trustees. The Transcrime Report confirms this in relation to Ireland:

> There is some opacity in the management of the trust as well; there is no authority that supervises the activity of trustees.[558]

The "Level Playing Field" report concluded that OECD jurisdictions are thus for the most part unable to regulate or control the quality or fitness to practice of trustees based or operating within such states, and lack the power to impose, monitor and importantly, enforce standards of competence and probity on those trustees.

Research by the ITIO presented in the "Level Playing Field" report indicates that the non-OECD OFCs examined have extensive legislation regulating trustees, and in some cases, such legislation has been in place for some considerable time. They argue that the non-OECD OFCs are clearly well advanced compared to the majority of OECD countries. Non-OECD OFCs note that the OECD has acknowledged that non-

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[557] Detailed review found under Appendix D.
[558] Research Centre on Transnational Crime – University of Trento, above n 514, 106.

OECD OFC regulatory and supervisory regimes would serve as useful models for "onshore" jurisdictions seeking to improve their regulatory or supervisory regimes.[559]

5.5.3 Ability to Exchange Information Internationally

To benchmark the "Level Playing Field" report, it is determined whether the countries surveyed are members of the Egmont Group of Financial Intelligence Units (the "Egmont Group") on the basis that membership of this group is a reliable indicator of whether provisions for international exchange of information exist in any particular jurisdiction.[560]

The Egmont Group now comprises 69 member countries which maintain operational financial intelligence units ("FIU"s). An FIU is a specialised government agency which has been created as part of a country's systems for dealing with the problem of money laundering. These entities facilitate the collation and exchange of information for the interdiction of money laundering between financial institutions and law enforcement/ prosecutorial authorities within individual countries, as well as between jurisdictions.

Of the 15 jurisdictions evaluated all are members of the Egmont Group.

5.6 Recommendations and Conclusions

5.6.1 Argument for a Level Playing Field

It is argued by Stikeman Elliot that for progress to be premised on the basis that uniform rules, developed in an inclusive process are implemented by all states, on the same time frame, with the same consequences for those states which do not co-operate. This is a fundamental objective, and essential to effectively achieving an equitable result.

The imposition of more onerous "compliance requirements" exclusively on non-OECD Member countries could be seen as hypocritical. Efforts to minimise the misuse of corporate vehicles should not be used as a guise for undermining the competitive position of those jurisdictions which have limited input into the standards' design process. To allow this misuse would be to compound the non-tariff barriers to the trade in services arising in other initiatives.

The ITIO believed that individual sovereign jurisdictions should have the opportunity to develop their own methods to ensure the timely access to corporate ownership information and the exchange of such information which is consistent with their own legal and social environment. As long as such information is available on a timely basis and subject to exchange in terms and circumstances agreed by consensus, the means through which this is achieved should be left to the individual states concerned.[561]

5.6.2 Balancing Competing Considerations – Confidentiality

[561] Stikeman Elliot, above n 559.

It is essential that confidentiality considerations are also taken into account in any development of new rules and regulations. It is dangerously inappropriate to seek law enforcement objectives to the exclusion of other considerations in civil society. Confidentiality is a basic human right and accordingly, any implications which may concern confidentiality need to be seriously considered by all the countries concerned.

5.6.3 Proportionate and Risk-Based Regulation

Appropriate regulation must strike a balance between law enforcement objectives and the reasonable needs of legitimate commerce. Accordingly the regulations must be proportionate to the risks and benefits associated with the activity being regulated.

A regulatory regime should focus attention and resources on those customers, accounts and transactions that are most vulnerable to money laundering and terrorist financing. An approach which does not permit a meaningful differentiation among customers, accounts and transactions will result in a misallocation of resources and reduce effective deterrence and prevention.

5.7 EU Savings Tax Directive Changes Level Playing Field

The EU came to a decision on the EU Savings Tax Directive.[562] With the introduction of automatic exchange for some and withholding tax for others, the level playing field is perceived to have become clearly biased. The EU Savings Tax Directive effectively gives the green light for four different regimes from 1 January 2004:

562 *Council Directive (EC) No 2003/48/EC of 3 June 2003 Taxation of Savings Income in the Form of Interest Payments* [2003] OJ L 157, 38.

- Withholding tax on EU residents' accounts (Switzerland, Austria, Belgium, Luxembourg, and probably Andorra, San Marino, Liechtenstein)
- Automatic exchange of information on EU resident accounts (EU and Gibraltar including probably the Crown Dependencies, Overseas Territories)
- The US (exchange of information and automatic exchange via bilateral tax treaties)
- The rest of the world, some of whom had committed to OECD (e.g. Panama, Antigua and Barbuda) and others likely to come under new pressures (e.g. Hong Kong, Singapore)[563]

Nevertheless, even in the absence of the detail, it is felt that this is a very good outcome for the Swiss, as it means no timetabled commitment to automatic exchange. The pressure is now off the Swiss and they can take an even more robust line with the OECD. But more importantly this is an excellent outcome for the US, who have controversially been deemed equivalent by the EU.

The OECD denied that the EU proposal meant that the OCED was moving away from a level playing field approach in its drive to end harmful tax practices and ensure fair competition on tax matters.[564]

[563] The European Union Savings Directive (council directive 2003/48/EC) was agreed on 3 June 2003.
[564] In 2002, by promising a level playing field (non-discrimination) between members (including all EU countries) and non-members, the OECD encouraged numerous small countries, including most ITIO members, to commit to exchanging tax information on request from 2006. However, the proposed EU saving tax directive flies in tbe face of the OECD promise by giving four OECD members – Austria, Belgium and Luxembourg and Switzerland – a competitive advantage over non-OECD countries by allowing them to defer exchanging information until 2011 or later. See 'Europe threatening OECD's plans to swap tax information' (2003) Trusts & Trustees <http://www.trusts-and-trustees.com/crn/press_release/pr_apr01_04.html> at 28 April 2004.

The EU and the OECD projects have been and continue to be different in their scope and coverage. With regard to information exehange, the EU's objective is the automatic exchange of information on personal savings accounts. The OECD countries are looking for exchange of information in relation to a broader range of mobile financial services, but on a case-by-case basis rather than an automatic basis.[565]

5.8 Selective Offshore Responses to OECD and FATF Initiatives

5.8.1 Caribbean

(i) Cayman Islands

Money Laundering Legislation

In order to establish how the Cayman authorities have reacted to international pressure, attention is drawn to the Cayman Islands legislation as this was the first British dependency to pass "all crimes anti-money laundering" legislation.[566] Similar legislation has now been passed in a number of other common law offshore jurisdictions. It has followed an evolutionary path similar to that of onshore legislation.

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[565] Quotation from spokesman Nick Bray from Keith Johnston, 'Changing the Rules of the Game' (2003) 11 *The STEP Journal* 16.
[566] *Money Laundering Regulations 2000* (Laws of the Cayman Islands)

In 1990, the Misuse of Drugs Law[567] ("MODL") implemented the Vienna Convention recommendations by creating anti-money laundering provisions in respect of the proceeds of drug-related offences, reporting of the proceeds and mutual legal assistance in respect of investigations into drug-related crime.[568]

These broad provisions were extended to all serious crimes in 1996, when the Cayman Islands' legislature enacted the Proceeds of Criminal Conduct Law[569] ("PCCL"). These two statutes now operate alongside one another: the MDL applying to the proceeds of drug-related offences; the PCCL applying to the proceeds of all other indictable offences.

The PCCL created four offences of money laundering based upon the UK's Criminal Justice Act[570] (CJA), namely, the offences of

- facilitating the retention of the proceeds of criminal conduct (s.21)
- acquiring, possessing or using the proceeds of criminal conduct (s.22)
- concealing, disguising or transferring the proceeds of criminal conduct (s.23)
- tipping off (s.24)

[567] *Misuse of Drugs Law 1990 rev* (Laws of the Cayman Islands)
[568] This fulfills the FATF Recommendations 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences; and 5: As provided in the Vienna Convention, the offence of money laundering should apply at least to knowing money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances.
[569] *Proceeds of Criminal Conduct Law 1996* (Laws of the Cayman Islands)
[570] *United Kingdom Criminal Justice Act 1988* (Application to Service Courts) (Evidence) Order 1996.

The above offences are committed by anyone who facilitates the retention (s.21), acquisition (s.22) or concealment (s.23) of the proceeds of criminal conduct while "knowing or suspecting" its real provenance.

In order to avoid liability under the PCCL, banks, trust companies and other financial institutions must disclose suspicious transactions to a Reporting Authority whose function is to collate and investigate such reports. Banks and other financial institutions making a disclosure report in good faith cannot be held liable to their customers in these circumstances for breach of their duty of confidentiality.[571]

By s.21(10) of the PCCL, the original offence that gives rise to the proceeds of criminal conduct must be an offence to which the PCCL relates, specifically

- an indictable (i.e. serious) offence committed in the geographical jurisdiction of the Cayman Islands
- conduct that would amount to an offence indictable (i.e. triable) in the Cayman Islands if that conduct has occurred in the geographical jurisdiction of the Cayman Islands.

[571] This fulfils FATF Recommendation 16: Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

These provisions represent a statutory definition of a traditional common law principle known as the "dual criminality principle". A person is liable for laundering the proceeds of crime if (and only if) the original crime is indictable in the Cayman Islands (in 99% of cases this means it must have been committed there) or the criminal conduct would amount to an offence indictable in the Cayman Islands had that conduct occurred in the Cayman Islands. In simple terms, this means that the original offence must be a crime committed in the Cayman Islands, or that the specific conduct would amount to a crime had it been committed in the Cayman Islands.[572]

PCCL and Tax Evasion: The Majority View

Does the offence of facilitating the retention (s.21), acquisition (s.22) or concealment (s.23) of the proceeds of criminal conduct include retaining, acquiring or concealing the proceeds of foreign tax evasion? Is a Caymanian financial services provider obliged to disclose to the Reporting Authority his belief or suspicion that his services are being used unlawfully to evade foreign tax?

The Cayman Islands now have "all crimes money laundering" legislation that contains a simple statutory dual criminality provision. A bank, trust company or service provider will become liable if it assists in facilitating the retention, acquisition or concealment etc. of the proceeds of criminal conduct if (and only if) the criminal conduct

[572] Parkinson and Howarth, above n 304, 92-4.

- is a crime indictable in the Cayman Islands, or
- would amount to an indictable crime if the conduct had occurred in the Cayman Islands

It is argued by many Caymanian commentators that as the Cayman Islands have no form of direct taxation, and therefore no laws making it a crime to evade such tax, it cannot be a crime to facilitate the retention, acquisition or concealment of the proceeds of foreign tax evasion. Furthermore, there is no requirement to make a disclosure to the Reporting Authority if an institution believes or suspects that its services are being used by a customer to evade foreign tax.

Filing a false tax return in the US is not a crime in the Cayman Islands. Besides, it is the opinion of the majority that it would not amount to a crime had the conduct occurred in the Cayman Islands. There is no income tax in the Cayman Islands and it cannot, therefore, be a crime to evade it. [573]

An agreement was made between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands, for the exchange of information relating to taxes, with respect to criminal tax evasion

[573] Ibid 95-6.

for taxable periods commencing from 2004, and shall have effect with respect to all other matters for taxable periods commencing from 2006.[574]

The Minority View

While it is true that there are no direct taxes levied in the Cayman Islands, there is still some form of "tax" in the more general sense of the word, (such as a tourist tax, stamp duty and import duties). It is a criminal offence unlawfully to evade these types of taxes in the Cayman Islands (by, for example, dishonestly filing a false return to the appropriate government authority). It could, therefore, be argued that tax evasion in its widest sense is an indictable crime in the Islands. Accordingly, an argument could be developed that the evasion of foreign tax would be a crime if that conduct had occurred in the Cayman Islands. A service provider who facilitates the retention and conceals the source of foreign tax evasion is, therefore, guilty of money laundering contrary to the PCCL.

Even if tax evasion is not a crime in the Cayman Islands, an individual who has unlawfully evaded tax abroad may not be indicted for the crime of tax evasion. He may (in the UK for instance) be indicted for the common law offence of cheat/fraud, or for any of the "theft" offences, such as deception, false accounting or forgery. These types of offence are very much a crime in the Cayman Islands and, therefore, the dual criminality test referred to above may be met. It could, therefore, be argued that an individual perpetrating a

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[574] U.S. Treasury Press Release, 'Agreement Between U.S. and Gov't of UK, Northern Ireland and Cayman Islands for Tax Info Exchange" 2001 <http://www.ustreas.gov/press/releases/archives/2001.html> at 28 April 2004.

foreign tax fraud would, by his conduct, have committed the crimes of fraud, deception, and false accounting etc., if his conduct had occurred in the Cayman Islands. A service provider who facilitates the retention and conceals the source of foreign tax evasion is, therefore, guilty of money laundering contrary to the PCCL. [575]

Summary

In summary, however, the conventional view is that the Cayman Islands anti-money laundering legislation (the PCCL) rests upon a dual criminality test. There is no crime of tax evasion in the Cayman Islands (because there are no direct taxes) and, therefore, there can be no offence of laundering the proceeds of foreign tax evasion. It remains to be seen whether the conventional view is accepted by the judiciary.

The Schedule to the PCCL of 1996 at the interpretation section in paragraph 3(1) contained a clause, which provided that:

(Criminal) conduct to which (the) Schedule applies is conduct which:[576]

- constitutes an offence to which (the PCCL) applies, or
- would constitute such an offence if it had occurred in the Cayman Islands, other than drug trafficking offences (covered by the MDL)

[575] Parkinson and Howarth, above n 573, 96-7.
[576] *Proceeds of Criminal Conduct Law 1996* (Laws of the Cayman Islands) para 3(1).

> *"and offences which relate directly or indirectly to the regulation, imposition, calculation or collection of taxes..."*

The Schedule is principally concerned with the enforcement of foreign confiscation orders. The exception referred to in the interpretation section, therefore, says in effect that the Grand Court of the Cayman Islands will not enforce foreign judgment or foreign confiscation orders made in relation to tax debts, or in relation to the evasion of foreign taxes. However, the exception originally found in the PCCL of 1996 and emphasised by the italics above was removed two years later by the Proceeds of Criminal Conduct (Foreign Offences) (Amendment) Law (Law 18 of 1998).

Disregarding the political manoeuvring, if any, the exception has now been repealed, and the Cayman Islands anti-money laundering legislation rests upon a dual criminality provision. Of course, if the majority view prevails, this means that financial service providers will not become liable for money laundering if they facilitate the retention (s.21), acquisition (s.22) or concealment of the source (s.24) of the proceeds of foreign tax evasion. Nor do they have to report those customers and clients whom they suspect are unlawfully evading foreign tax.

The compelling nature of this argument rests upon the fact that the Cayman Islands do not impose any form of direct tax. It is an argument which is (or will be) adopted by other nil tax havens that have enacted "all crimes anti-money laundering" legislation. It is not an argument, however, that can be adopted by the low tax havens of Europe, such as the Channel Islands and the Isle of Man (nor indeed by Bermuda hecause of its pay-roll tax) which feel that they have now been placed at a significant disadvantage as international financial centres when compared with the Carihbean nil tax centres. [577]

Mutual Legal Assistance

Mutual legal assistance and, in particular, the sharing between states of information relating to money laundering, is another OECD recommendation.[578]

The Confidential Relationships (Preservation) Law makes it a criminal offence for any person to divulge, attempt to divulge, wilfully obtain or attempt to obtain any information which is confidential. In 1986 a treaty was signed between the United States and the United Kingdom (including the Cayman Islands) on mutual legal assistance in criminal matters - The Mutual Legal Assistance Treaty.

The objects stated in the treaty are to improve the effectiveness of the law enforcement authorities of both the United States and the Cayman Islands in the investigation, prosecution and suppression of crime through co-operation and mutual legal assistance in criminal matters. The treaty provides machinery whereby the Attorney-General of the United States can request that otherwise

577 Parkinson and Howarth, above n 575, 97-9.
578 This is the OECD Recommendation 8: Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.

confidential information be ordered to be released by the Cayman authority (the Chief Justice of the Cayman Islands or other Grand Court Judge) when the Cayman authority is satisfied that the information is properly required in connection with the investigation, suppression or persecution of various types of criminal activity.[579]

The Reporting Authority established under the PCCL may share information it receives in relation to suspicious transactions with other agencies including, with the consent of the Attorney General, overseas agencies situated outside the geographical jurisdiction of the Cayman Islands.

Confiscation and forfeiture orders and restraining orders may be made in respect of the proceeds of criminal conduct that find their way into the Cayman Islands' financial system (s.6 PCCL). Furthermore, the Grand Court of the Cayman Islands will enforce foreign confiscation and forfeiture orders when it has been established by a foreign court that funds in the Cayman Islands' financial system represent the proceeds of criminal conduct (ss.29-36).[580]

Secrecy and Confidentiality

Banking confidentiality is well-established in Cayman through the common law, and is also enshrined both in the Banks and Trust Companies Law 1995 and in the Confidential Relationships (Preservation) Law 1995. Banking staff

[579] Aall Trust and Banking Corporation, <http://www.aall.com> at 3 November 2003.
[580] Parkinson and Howarth, above n 577, 100-1.

and government officials face civil and criminal sanctions if information is disclosed without authorisation. A number of laws permit the enforcement of foreign judgements or the disclosure of information in response to a court order, but normally in the context of criminal activity and drug use or dealing.

Despite mutual assistance treaties, the Cayman Islands will not normally co-operate with fiscal investigations, and does not normally respond to requests for assistance on fiscal matters.[581]

Conclusion

The provisions of modern anti-money laundering legislation oblige banks, trust companies, and other financial and corporate service providers to be exceedingly careful. Inquiries concerning the provenance of each client's funds have to be made more prudent than at any time in the past. The clear objective of the legislation is to eradicate the laundering of the proceeds of all crime. If financial service providers do receive monies that represent the proceeds of criminal conduct, or become suspicious about their provenance, the matter ought to be reported to the appropriate authorities (namely, the authority mentioned in the applicable money laundering legislation).[582]

The Cayman Islands which was not included in OECD's list of tax havens, is no longer on the FATF NCCTs list, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

[581] Lowtax.net, *Cayman Islands table of statutes* <http://www.lowtax.net/lowtax/html/jcahom.html> at 10 July 2004.
[582] Parkinson and Howarth, above n 580, 105-7.

(ii) Panama

Money Laundering Legislation

In 2000 Panama adopted four stringent decrees to further screen out money laundering. These measures were:

1) Legislative Assembly Law No. 41 of October 2, 2000, entitled "Capital Laundering" and amending the Penal Code by imposing harsh penalties of up to ten years imprisonment for publicly breaching the secrecy of information or carrying out unlawful transactions related to capital laundering;
2) Legislative Assembly Law No. 42 of October 2, 2000, setting down Measures for the Prevention of the Crime of Capital Laundering;
3) Ministry of the Presidency Decree No. 136 of October 3, 2000, creating the Financial Intelligence United for the Prevention of Capital Laundering; and
4) Executive Decree No. 213 of October 3, 2000, amending the 1984 Decree relating to the practice of trusts and making it compulsory for banks and certain financial institutions to render information on "suspicious transactions".

Under a Panamanian law passed in 1994 with the help of the Panamanian Bar association, money laundering is penalized with prison sentences recently raised to a maximum of 12 years, no bail for defendants, and confiscation of assets. Bank employees are subject to criminal responsibility if found guilty of allowing any money laundering or bending the rules for extradition of offenders in drug-related cases.[583]

A "Financial Analysis Unit (FAU) for the Prevention of Money Laundering Obtained from Drug Trafficking" operating under Executive Decree No. 136 of June 9,1991 has been successful in compiling information from banks and other private and Government entities and individuals to inhibit activities linked to money laundering. In 2000, the FAU received increased authority to analyze all information compiled to detect suspicious or unusual transactions and movements of cash in the country from drug trafficking. Confidentiality of all financial and banking transactions is honoured in order to protect the respectable status of the FAU.[584]

Panama and Tax Evasion

Panama has not entered into any double taxation treaties. The mutual legal assistance treaties contain limited exchange of information provisions. Information exchange is restricted to information extracted from the carrying out of prosecution procedures, not excluding tax matters. The local authorities

[583] This fulfils the FATF Recommendations 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences; 5: As provided in the Vienna Convention, the offence of money laundering should apply at least to knowing money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances; and 6: Where possible, corporations themselves - not only their employees - should be subject to criminal liability.

[584] An excerpt from Walter H and Dorothy B Diamond, *Panama as a Tax Haven* Sovereign Management Services, S.A.: Tax Havens of the World <http://www.offshore-protection.com/panamaHaven.html> at 11 November 2003.

would not grant a request for assistance in an investigation into tax evasion. A request for co-operation would have to be made by petition.[585]

Mutual Legal Assistance

In April, 1991, Panama signed an agreement for a "Treaty for the Mutual Assistance on Criminal Matters" with the United States in order to provide for more effective coordination between the two countries in dealing with investigating, prosecuting, and suppressing serious crimes, and with continuing effort to increase this effectiveness. Despite powerful opposition from Panamanian bankers, who were concerned the treaty would violate their secrecy status code, the National Legislative Assembly of the Republic of Panama approved the execution of the treaty in July 1991. This Mutual Assistance Treaty, similar to those approved with other Caribbean Basin Initiative countries, including Bahamas, British Virgin Islands and Cayman Islands, relates to drug abuse, crime and fraud, or specifically such criminal activities as illegal narcotics, theft, crime of violence, fraud, or use of fraud, or violation of a law of one of the Contracting States relating to currency or other financial transactions contributing to the crime. The provisions in the treaty do not allow for any exchange of information in matters relating to taxation.[586]

In an effort to cooperate in the arrest of money launderers, the Government also signed a Mutual Legal Assistance Agreement with the United Kingdom

[585] Spitz, above n 274, 623.
[586] This fails to adhere to the OECD Recommendation 14: Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.

and adopted a law tightening requirements for companies' registered agents concerning gathering information and their client references.[587]

Secrecy and Exchange of Information

Panama has concluded mutual legal assistance treaties with the US, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Colombia. The treaties operate at the administrative level: in other words, Court procedures are not required, although there is an appeal procedure. The treaties cover serious crime, but do not include fiscal crime. The Panamanian authorities do not entertain requests for information on fiscal matters.[588]

Executive Decree No. 213 of October 2, 2000, which established the Financial Intelligence Unit for the Prevention of Capital Laundering, covers disclosure of information concerning trusts obtained by the Banking Superintendency or any other Government inspectors and introduces penalties for breaches of confidentiality in all financial matters. A public official violating this provision may have to pay a fine up to $1,000,000.

Banks and other financial institutions must practice proper due diligence under Panamanian law. They are required to know their clients, monitor and report suspicious transactions of which they are aware, establish internal procedures and controls to prevent money laundering operations, train personnel properly

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587 Diamond, above n 584.
588 Lowtax.net, *Double Taxation Treaties in Panama* <http://www.lowtax.net/lowtax/html/jpahom.html> at 10 July 2004.

to deter tainted transactions, and keep records of all documents and transactions for a period of five years.[589]

The July 27, 1994 Law was further strengthened by Executive Decree No. 468 of September 19 of that year, and the Code of Conduct approved by the International Lawyers Association, which makes it mandatory for all attorneys to know their clients and to obtain sufficient information and references from clients before rendering any services. A high-level Presidential Commission operates with authority to use all means to prevent money laundering and a so-called "Drug czar" coordinates its efforts with other activities to promote anti-money laundering.

Presidential Decree No. 163 of October 2, 2000 amended Decree No. 136 of June 9, 1995, extending the operational capacity of the Financial Intelligence Unit by listing in detail the Unit's functions for: (1) covering collection of information from public institutions and private entities; (2) identifying suspicious or unusual transactions by studying information; (3) exchange of information with similar enterprises in other countries; and (4) providing assistance when required to the Office of the Attorney General and Banking Superintendency.[590]

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[589] This fulfils FATF Recommendation 12: Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour. Financial institutions should keep records on customer identification (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the account is closed. These documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations.

[590] Diamond, above n 587.

The FATF on Money Laundering "Black List"

On June 26, 2000, the FATF on Money Laundering issued a "Black List" of countries considered non-cooperative jurisdictions. Panama was included in that Black List, as a Class 3 country, which meant that it was a country that did not co-operate with tax authorities of OECD countries. In June 2001, the FATF updated the list of NCCTs with the publication of its second NCCT Review. The four countries which were taken off the list were Bahamas, Cayman Islands, Liechtenstein and Panama.[591]

Consequences for Panama

The effect for Panama of its inclusion in this list, was that the OECD governments had threatened to impose sanctions on the listed countries, including the prohibition for their financial institutions to perform any kind of business with any institution located in a listed country.

The current government, through the High Level Presidential Commission Against Money Laundering, has the primary responsibility of analyzing the international events that are affecting the condition of Panama as a centre for international business, and in particular, the initiatives of the OECD, which

591 Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2001 FATF).

may cause a negative impact in their capability of attracting foreign investment.[592]

Conclusion

All the legislative improvements are based on the intention to keep Panama's offshore system, its secrecy laws, banking centre and all its international services sectors out of the reach of criminals. Furthermore, the government wanted to send a clear message to the FATF and the OECD, that Panama was implementing serious measures to prevent the use of the country for unlawful international crimes.[593] That paid off and in June 2001, Panama was one of the four countries taken off the list of countries deemed non-cooperative in the fight against money laundering.

Panama, which was on both the FATF NCCTs list and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

(iii) British Virgin Islands (BVI)

Anti-Money Laundering Legislation

[592] Salvatore Bacile and Alvaro Aguilar, *Comments of the New World Trends to Enforce Access to Banking Information with Tax Purposes* (2003) The American Chamber of Commerce and Industry of Panama (AMCHAM) <www.panamcham.com> at 11 November 2003.
[593] Parkinson and Howarth, above n 582, 15.

The Proceeds of Criminal Conduct Act, (together with the Code of Practice / Money Laundering Regulations passed thereunder) comprise the BVI's latest and, in the commercial environment of this jurisdiction, most significant step in the area of anti-money laundering legislation. This Act came into force on 2 January 1998 and complements pre-existing legislation such as the Drug Trafficking Offences Act, the Criminal Justice (International Cooperation) Act and the Mutual Legal Assistance (USA) Act.

In December 1996, the Association of Registered Agents approved a governing Code of Conduct which extensively covers a wide range of due diligence procedures to be followed by trust companies and company formation agents in order to preserve the BVI as an offshore centre and to prevent the use of the jurisdiction for illegal and criminal purposes. It was the intention to formulate the Code of Conduct into legislation for the purpose of enhancing the regulatory measures germane to the maintenance of the BVI as a sound international financial centre.[594]

Tax Information Exchange Agreement

At the signing of a new Tax Information Exchange Agreement with the United States was the creation of a competent anti-tax evasion tool.[595]

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[594] Joint Anti-Money Laundering, Coordinating Committee, *Guidance Notes on the Prevention of Money Laundering, British Virgin Islands, Anti-money Laundering Code of Practice* (1999) Official Documents <www.archive.official-documents.co.uk> at 11 November 2003.

[595] This fulfills OECD Recommendations 8: Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition; and 14: Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.

In line with the agreement with the OECD, the BVI agreed with the US an effective exchange of information on request for criminal tax matters from January I 2004 and for civil tax matter from January 1, 2006.[596]

Speaking after the signing of the agreement, BVI Governor, Frank Savage, observed that allowing the US Internal Revenue Service to pierce banking secrecy in cases of tax evasion and money laundering, clearly demonstrated that the country had been working 'to increase the transparency of our systems and reduce the potential for abuse'. [597]

US Treasury Secretary, Paul O'Neill said that the Bush administration welcomed the agreement with the BVI, explaining that: 'We have an obligation to enforce our tax laws because failing to do so, undermines the confidence of honest taxpayers of our system. Onc of the keys to enforcement of our tax laws is access to needed information.'[598]

Mutual Legal Assistance

Mutual Legal Assistance (USA) Act 1990 (No. 5 of 1990) is intended to give effect to the terms of a treaty made between the Government of the United States of Amcrica and the Government of the United Kingdom dated 3rd July 1986 for improving the effectiveness of the law enforcement authorities of the

[596] Harney Westwood & Riegels, *Transparency and the Obligation of Confidentiality in the British Virgin Islands* (2002) Harneys <http://www.harneys.com> at 11 November 2003.
[597] www.lawandtax-news.com, British Virgin Islands, International Agreements.
[598] Ibid.

United States of America and the British Virgin Islands in the prosecution and suppression of crime through co-operation and mutual legal assistance in criminal matters and for purposes connected therewith. The Act allows the United States Central Authority, defined in the Treaty to be the Attorney General or person designated by him, to make a request of the British Virgin Islands Central Authority, the Attorney General, for assistance in obtaining information concerning a criminal offence. The provisions of the Act do not extend to any matter which relates to regulation including fiscal matters or to offences which are not punishable by a term of imprisonment of more than one year. (Paragraph 1 of Article 3 of the treaty.) The Act extends protection to allow for confidential information to be obtained. Section 9 provides that there shall be no criminal or civil sanction against a person who divulges confidential information pursuant to a request.[599]

Secrecy and Confidentiality

There is no statutory duty of confidence under British Virgin Islands law. However a duty of confidence is imposed at common law. Alternatively a duty of confidence may be imposed by contract. A breach, or threatened breach, of confidence (common law or contractual) is actionable in the High Court in the British Virgin Islands. The High Court will grant an injunction to restrain any

[599] Harney Westwood & Riegels, above n 596. This fulfils the FATF Recommendation 16: Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

threatened breach and will award damages for any actual breach. There is no criminal sanction for breach of a duty of confidence.

The extent of the common law duty of confidence depends upon the nature o the relationship between the relevant parties. A duty of confidence arise whenever confidential information comes to the knowledge of a person, i circumstances where he has notice, or is held to have agreed, that th information is confidential, with the effect that it would be just in all th circumstances that he should be precluded from disclosing the information t others. There is a public interest in preserving a duty of confidence which th Court will enforce. However, there are three general limiting principles on th duty of confidence.[600]

The BVI Government signed a Tax Information Exchange Agreement with th UK and the USA on 3 April 2002. The BVI thus joined Antigua and Barbuda the Bahamas and the Cayman Islands who have already executed suc agreements. The agreement provided arrangements for the exchang information about criminal tax evasion from 1 January 2004 and all othe matters from 1 January 2006.[601]

Notwithstanding any duty of confidence which exists at common law o pursuant to a contract, there are several circumstances whereupon it may b necessary to provide information to third parties. The following comprise th

[600] Ibid.
[601] The ILS Group, *Around the World* (2002) <www.ils-world.com> at 11 November 2003.

most significant exceptions which exist pursuant to statute and at common law.

1) Evidence (Proceedings in Foreign Jurisdictions) Act (Cap 24);
2) Mutual Legal Assistancc (USA) Act 1990 (No. 5 of 1990);
3) Criminal Justice (International Co-operation) Act 1993 (No. 8 of 1993);
4) Proceeds of Criminal Conduct Act 1997 (No. 5 of 1997) as amended;
5) Drug Trafficking Offences Act 1992 1992 (No. 5 of 1992);
6) Banker Books Evidence Act (Cap 7);
7) Banks and Trust Companies Act 1990 (No. 9 of 1990) as amended;
8) Company Management Act 1990 (No. 8 of 1990) as amended;
9) Mutual Funds Act 1996 (No. 6 of 1996) as amended;
10) Insurance Act 1994 (No.15 of 1994) as amended;
11) Financial Services (International Co-operation) Act 2000 as amended;
12) Financial Services Commission Act 2001;
13) Orders for discovery and inspection of documents pursuant to Part 28 of the Civil Procedure Rules of the Supreme Court;
14) Discovery Proceedings in the British Virgin Islands (Norwich Pharmacal proceedings); and
15) Tax Information Exchange Agreement (USA & UK) Act 2002[602]

Conclusion

[602] Harney Westwood & Riegels, above n 600.

With its high quality financial services, sound regulatory framework and political stability, the British Virgin Islands (BVI) has established a reputation as one of the world's leading international offshore centres. The BVI has earned a solid reputation as the world's leading domicile for International Business Companies (IBCs). The 1984 IBC Act has proved to be a milestone in the development of the financial services industry. Since the adoption of this legislation, the BVI has become a high-quality international financial centre, regularly undertaking programmes to expand its financial services offering to meet the demands of international financial markets. The key to the development of the BVI has been the partnership which exists between the government and the private sector, and the commitment of both to creating a jurisdiction that is a leader in the provision and regulation of financial services.[603]

The BVI Financial Services Commission is reviewing the existing Companies Act and the IBC Act, intending to update and amalgamate into a single corporate statue, with the aim of enforcing it in 2005. The new Companies Act will retain all the virtues of the IBC but will be enhanced to be made more attractive to clients. The new legislation will extend the same zero tax regime enjoyed by IBCs to local companies and thereby bringing BVI into line with the EU Code of Conduct on Business Taxation. This will make the BVI

[603] 'BVI Launches New Package of Insolvency and Trusts Regulation' (2003) 8 *Offshore Red: An OFC News Update* 98.

company an even better international proposition and cement their position as the first-choice offshore incorporation destination.[604]

The British Virgin Islands, which was on both the FATF NCCTs list and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

(iv) *The Bahamas*

Anti-Money Laundering Legislation

Money Laundering (Proceeds of Crime) Act 1996

1) A person is guilty of an offence if he uses. transfers the proceeds of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of -

(a) the commission in The Bahamas of any offence under the Dangerous Drugs Act;

604 Robert Mathavious, 'Overview of the Regulatory Environment in the BVI' (Speech delivered at the 'The BVI Advantage" Seminar held by the BVI International Finance Centre, Singapore, 13 May 2004).

(b) the commission in The Bahamas of any offence which is punishable by a term of imprisonment of not less than five years;

(c) an act or omission anywhere that, if it had, occurred in The Bahamas would have constituted an offence under the Dangerous Drugs Act;

(d) an act or omission anywhere that if it had occurred in The Bahamas would be punishable by a term of imprisonment of not less than five years.

2) A person who commits an offence under subsection (1) shall be liable -

(a) on conviction on information to imprisonment for a term not exceeding ten years; or

(b) on summary conviction to imprisonment for a term not exceeding five years.[605]

The establishment of the Financial Intelligence Unit under the provisions of the Financial Intelligence Unit Act (No. 39 of 2000) now means that the Financial Intelligence Unit is responsible for receiving, analyzing, obtaining and disseminating information which relates to or may relate to the proceeds of crime under the provisions of the Proceeds of Crime Act, 2000 (No. 44 of 2000) namely offences under the Prevention of Bribery Act, drug trafficking

[605] United Nations, Office on Drugs and Crime, *Money Laundering (Proceeds of Crime) Act, 1996* (1996) <www.unodc.org> at 9 November 2003.

offences, money laundering offences, offences which may be tried on information other than drug trafficking offences and offences committed anywhere that if they occurred in The Bahamas would constitute offences in The Bahamas. The Act provides the principal legal mechanism for international cooperation with other foreign Financial Intelligence Units and law enforcement authorities. Pursuant to the Financial Intelligence Unit Act, the Unit may now provide information relating to the commission of an offence specified in the Proceeds of Crime Act, 2000 to any Foreign Financial Intelligence Unit, subject to any conditions as may be considered appropriate by the Director of the Financial Intelligence Unit of The Bahamas. Under the Act, the Unit is given power to enter into any agreement or arrangement, in writing, with a Foreign Financial Intelligence Unit which the Director considers necessary or desirable for the discharge or performance of the functions of the Financial Intelligence Unit.[606]

Tax Evasion

Since the Bahamas do not levy direct taxes, there are no double tax treaties between the Bahamas and other countries.

There are mutual assistance treaties with the US, Canada and the UK which include exchange of information provisions; but fiscal information is excluded. Disclosure is limited to criminal matters, and tax evasion is not a crime in the Bahamas. The Bahamian statute Reciprocal Enforcement of Judgements Act

[606] Organisation of American States, 'The Bahamian International Cooperation Regime for Criminal Matters' (2000) <http://www.oas.org> at 9 November 2003.

1924 allows Commonwealth judgements to be enforced in the Bahamas, but revenue matters are excluded.[607]

The Mutual Legal Assistance (Criminal Matters) Act, 1988

The Mutual Legal Assistance in Criminal Matters Treaty signed by the Governments of The Bahamas and the United States of America on 12th June 1987 and 8th August 1987 respectively, is given domestic effect by the Mutual Legal Assistance (Criminal Matters) Act 1988 (No.2 of 1988). The said legislation came into force on 20th August 1990. The Mutual Legal Assistance Treaty signed with Canada on the 13th March, 1990 is given domestic effect by the Mutual Legal Assistance Criminal Matters Act, 1988 (Amendment of Schedule) Order, 1990 (S.I. No. 54 of 1990). Under both Treaties the Attorney General of The Commonwealth of The Bahamas is the Central Authority to whom requests for assistance should be addressed.

In the absence of a Treaty and its relevant domestic enabling legislation, a foreign Court, tribunal or authority seeking evidence or the disclosure of information in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, must apply to the Attorney General for assistance pursuant to the provisions of the Criminal Justice (International Co-operation) Act, 2000 (No.42 of 2000).[608]

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[607] Lowtax.net, *Double Taxation Treaties in Bahamas* <http://www.lowtax.net/lowtax/html/jbahom.html> at 10 July 2004. This fails to adhere to the OECD Recommendation 14: Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.
[608] Organisation of American States, above n 606.

Secrecy and Confidentiality

Secrecy and confidentiality is preserved under the Bank and Trust Companies Regulation Act. There is no requirement for disclosure of the Beneficial Ownership to the authorities. While there is no requirement to file audited accounts with the authorities, a company is required to keep financial records.

The Bahamian Banks and Trust Companies Regulation Act 1965 stipulates stiff penalties: up to two years in jail and a fine equivalent to $15,000 for any employee who discloses confidential client information.[609]

The Bahamas has based its confidentiality laws on the Swiss model of bank secrecy. Banks practice due diligence and follow "Know Your Customer" rules. Access to bank records is only available to signatories on the account-and to no one else. Only by proving in court that it helps in the prosecution of a criminal act, could a foreign authority, such as the IRS, be granted access to banking records in the Bahamas.[610]

The Financial Intelligence Unit is also responsible for the receipt and analysis of suspicious transaction reports required to be made under the provisions of the new Financial Transactions Reporting Act, 2000 (No.40 of 2000). Under the Financial Transactions Reporting Act, 2000, financial institutions within The Bahamas are now required under penalty of law to verify the

[609] Paul Zaleski, *Bank Secrecy Waiver Agreements: The Confidentiality Exception* (2000) Escape Artist <http://www.escapeartist.com/Offshore_Finance_USA/Bank_Secrecy_Waiver.html> at 9 November 2003.

[610] Stephanie O'Hanley, *Password Please* (2001) Vault Magazine <http://www.ofcpublications.com/Index/articles/artjf01-0028.html> at 9 November 2003.

identification of customers and to report suspicious transactions which they know, suspect or have reasonable grounds to suspect involves proceeds of criminal conduct as defined in the Proceeds of Crime Act, 2000, or any offence under the Proceeds of Crime Act, 2000, or an attempt to avoid the enforcement of any provision of the Proceeds of Crime Act to the Financial Intelligence Unit.[611]

Conclusion

The Bahamas has been a domicile for funds for 40 years and currently has 750 regulated funds with assets of approximately US$100 billion. Since the creation of the Securities Board, now the Securities Commission, and the passing of the Mutual Funds Act and regulations in 1995, The Bahamas has been vying for recognition as a properly regulated environment for establishing and operating funds. There are more than 50 licensed fund administrators in The Bahamas.[612]

Out of all the jurisdictions blacklisted as 'harmful' tax havens by the OECD and 'uncooperative' in the global fight against money laundering by the

[611] Organisation of American States, above n 608. This fulfils the FATF Recommendations 10: Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions); and 14: Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

[612] Ernst & Young (Nassau), 'Mutual Funds in The Bahamas' (2003) 8 *Offshore Red: An OFC News Update* 138.

FATF[613], the Bahamas believes that it has introduced some of the most comprehensive new legislation into its financial services sector. But this is still not enough for the multilaterals, as the FATF has identified a crucial element the Bahamas government has omitted in its extensive legislative programme.

The Bahamas Journal reported (13/2/01) that the FATF has called upon the Bahamas government to correct legislative deficiencies it has discovered in the country's securities, namely the Securities Act, the Mutual Funds Act and the Insurance Act. This came as a real setback to the Bahamas, which was so close to coming off the blacklist, but if the jurisdiction refused it, could risk staying on the FATF blacklist of 15 jurisdictions.

The FATF viewed provisions in the Securities Act, the Mutual Funds Act and the Insurance Act still allowed for secrecy and need to be amended to ensure for cooperation in investigating suspected money laundering activities.

The Executive Secretary of the FATF, Patrick Moulette, is reported to have said that the FATF's policy is that anti-money laundering measures should apply not only to banks but also to non-bank financial like remittance businesses, insurance companies and securities businesses.[614]

613 See Appendix U for a list of NCCTs.
614 This is according to Recommendation 8 which states: Recommendations 10 to 29 should apply not only to banks, but also to non-bank financial institutions. Even for those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries, for example bureaux de change, governments should ensure that these institutions are subject to the same anti-money laundering laws or regulations as all other financial institutions and that these laws or regulations are implemented effectively.

Perversely, the FATF, in its 2001 review meeting[615], voted the Bahamas as one of seven jurisdictions most likely to be removed from the blacklist in the near future.

On 23 July 2003, the IMF concluded the Article IV consultation with The Bahamas and released its Staff Report. In the Staff Report, it recognised the country's long track record of 'prudent macroeconomic management and financial stability'. The Report noted that Bahamian financial regulations and supervision have continued to improve, including anti-money laundering legislation.

The Report emphasised that further progress with structural reform would help to lower costs and preserve external competitiveness. It also saw a need to reduce trade restrictions, including the very high tariff rates, and to simplify the tariff structure. It also recommended a gradual move toward a 'more flexible and market-oriented framework for liquidity and credit management'. The Report also cited the strengthening supervisory environment in The Bahamas.[616]

In response to the Report, the Bahamas Financial Services Board (BFSB) released a statement saying that it 'will build on the extensive work completed in 2001 where a comprehensive proposal was submitted to government and regulators based on active participation of many professional industry associations with regard to the new FATF 40 recommendations.' The BFSB

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615 See Financial Action Task Force, above n 591.

616 'Bahamas Gets Positive IMF Report' (2003) 8 *Offshore Red: An OFC News Update* 124.

also stated that meetings with professional industry associations and regulators like the Securities Commission, Central Bank and the Registrar have been held. The BFSB was hopeful that significant progress would be made through the introduction of the new Investment Funds Act, Regulations and SMART Funds templates, policy directives on matters such as corporate directors and private trust companies, and other such projects.[617]

The Bahamas, which was on both the FATF NCCTs list and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.2 Pacific Basin

(i) Cook Islands

Anti-Money Legislation

Prior to its August 2000 enactment of the Money Laundering Prevention Act, the Cook Islands had in place the Offshore Industry (Criminal Provisions) Act (the "OIA") and the International Trusts (Due Diligence) Regulations (the "Regs"). The OIA permitted trustee companies to report suspicious transactions to a regulatory authority. The regulatory authority could then seek directions from the Cook Islands High Court regarding the matter, including directions as to the disposition of the funds involved in the transaction. The

[617] Ibid.

Regs required trustee companies to obtain certain assurances as to the origin and ownership of funds transferred to international trusts, and to obtain additional assurances as to the solvency of the settlor. However, neither the OIA nor the Regs (both of which continue in force) made money laundering a crime, nor did either establish a mutual assistance structure.[618]

The Money Laundering Prevention Act makes money laundering a crime under Cook Islands law. The Act defines "Money Laundering" as knowingly –

(a) engaging directly or indirectly, in a business transaction that involves property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime; or

(b) receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from or bringing into the Cook Islands any property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime.

The term "proceeds of crime" is defined as "the proceeds of unlawful activity (whether derived or obtained directly or indirectly through such activity), and includes any property that is mingled with property that is the proceeds of unlawful activity."

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[618] Without classifying money laundering as a crime, it is not adhering to the FATF Recommendation 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.

The term "unlawful activity" means "any activity which –

(a) is an offence under the Crimes Act 1969 [of the Cook Islands] and carries a maximum penalty of imprisonment of not less than 5 years imprisonment or the death penalty; or

(b) under the laws of the place where the activity occurs, constitutes drug trafficking; or

(c) (i) under the laws of any place where the activity occurs constitutes an offence which carries a maximum penalty of imprisonment of not less than 5 years or the death penalty, and

(ii) would be an offence under the Crimes Act 1969 if such activity occurred within the Cook Islands and such offence carries a maximum penalty of imprisonment of not less than 5 years or the death penalty.

The Act establishes a Money Laundering Authority, to which reports of suspicious activity are to be made.[619]

After the 11 September, 2001, terrorist attacks in the United States, the Cook Islands reiterated its commitment to the prevention of money laundering activities set out in the Money Laundering Prevention Act 2000 by announcing the Money Laundering Prevention Regulations 2001.

[619] Donlevy-Rosen and P A Rosen, *Prevention of Money Laundering: Recent Offshore Legislation* (2000) The Asset Protection News <http://www.assetprotectionnews.com/apn9-2-fr.html> at 9 November 2003.

The new rules incorporate Guidance Notes for Financial Institutions based on models from New Zealand, Japan and Guernsey. Issues covered in the notes include 'Know Your Customer' rules; recognising suspicious customers or transactions; reporting of suspicion transactions; and keeping records and training.[620]

The Financial Supervisory Commission (FSC) Act establishes a new statutory commission to licence and regulate all trustee companies and banks providing domestic and international services in or from the Cook Islands. Insurance companies also come within the jurisdiction of the FSC.

The Banking Act sets out a new licensing regime for domestic and international banks and introduces increased levels of regulation and supervision as well as more stringent licensing requirements. Previously, domestic and offshore banks have been licensed under separate statutory regimes. Existing banks licensed under the previous domestic and offshore banking acts are deemed to be licensed under the new act, but only for one year following the coming into force of that Act. Domestic and international licensees are required to have a physical presence in the Cook Islands and to have at least two persons resident in the Cook Islands as directors.[621]

Tax Evasion

[620] Lowtax.net, *Double Taxation Treaties in Cook Island* <http://www.lowtax.net/lowtax/html/jcihom.html> at 10 July 2004. This fulfils the FATF Recommendations 10 - 15.
[621] 'Batch of New Financial Laws Passed in the Cook Islands' (2003) 8 *Offshore Red: An OFC News Update* 103.

The Cook Islands have not entered into any Double Tax or Mutual Assistance treaties with other countries. The Islands have passed other laws dealing with provision of information in respect of criminal matters, but the authorities generally do not respond to requests for information regarding fiscal matters or tax evasion.[622]

Mutual Legal Assistance

The Money Laundering Prevention Act 2000 makes provision for co-operation by the Authority with a foreign State, with whom the Cook Islands has entered into mutual assistance arrangements on a bilateral or multilateral basis, in the investigation or prosecution of an unlawful activity. There is also provision for mutual assistance with a foreign state, subject to the approval of the Minister of Finance, where no agreement exists but where the seriousness of the money laundering offence under investigation warrants mutual assistance.[623]

Secrecy and Confidentiality

Government officials and the employees of banks, insurance companies, trust & corporate entities are compelled to observe secrecy and failure to do so leading to an unauthorized disclosure will result in penal sanctions.

The general rule prohibiting disclosure is subject to 3 exceptions namely:

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[622] Lowtax.net, above n 620.
[623] Commissioner For Offshore Financial Services, Mathilda C R Uhrle, 'Measures Taken in the Cook Islands to Counter Money Laundering' (Speech delivered at the Asian Development Bank 34th Annual Meeting of the Board of Governors, Honolulu, 7 May 2001)

1) Under the International Companies Act 1981 the high court on application of an interested party has power to order disclosure of corporate information in a case involving drug trafficking or money laundering. The power to order disclosure does not extend to fiscal crime. Appeal lies to the Islands' Court of Appeal and thereafter to the Privy Council in London.

2) Under the Offshore (Criminal Provisions) Act 1996 an officer or employee of a registered trust entity (which incorporates and manages companies and trusts) who has cause to suspect that a company or trust is involved in drug trafficking or that a person related to or involved with that entity has been convicted of serious criminal activity, must refer the matter to the Government regulatory body. Furthermore the registered trust entity is to provide such reasonable assistance, documentation and other information as may be required by the Government regulatory body under the law. Serious criminal activity is defined as drug trafficking or any other activity whether in the Cook Islands or elsewhere which if committed in the Islands is or would be an offence under the Crimes Act 1969 carrying a maximum penalty of 5 years or more. Information provided in these circumstances does not breach confidentiality provisions of the Cook Islands. Disclosure never extends to fiscal crime.

3) The Trustee Companies (Due Diligence) Regulations 1996 require the officers and employees of a registered trust company to take reasonable precautions to ensure that an International Trust is not being used to shelter

assets derived from drug smuggling, money laundering or other serious crime and to report any such activity.[624]

The Financial Transactions Reporting Act formally establishes customer identification procedures for financial institutions. Financial institntions are also required to carry out ongoing scrutiny of customer transactions and to maintain transaction records. The Financial Transactions Report Act also requires the reporting to the Cook Islands Financial Intelligence Unit, of cash and international wire transfers exceeding 10,000 New Zealand dollars (US$5,700). Suspicious transactions must also be reported to the Financial Intelligence Unit. The confidentiality provisions in other statutes relating to the financial services industry are overridden by this requirement.[625]

FATF Blacklist[626]

In Jnne 2000, the Cook Islands was blacklisted by the FATF as a non-cooperative and harmful tax haven.

In September 2000, the Cook Islands parliament passed the Money Laundering Prevention Act, which provided for the setting up of a Money Laundering Authority, to consist of the government's financial secretary, the commissioner for offshore financial services and the commissioner of police.

624 Lowtax.net, above n 622.
625 *Offshore Red: An OFC News Update*, above n 621.
626 See Appendix U for the FATF Blacklist of NCCTs as updated to July 2004.

In 2003, a series of nine new measures were introduced in the Cook Islands Parliament over the regulation of domestic and offshore financial industries after the cabinet approved the work of an Anti-Money Laundering/Counter Financing Terrorism Committee. The Committee reported it was hopeful the enactment of the legislation would finally satisfy the FATF. The bills included a Financial Transactions Reporting Act, which will require all banks to report local and international money transfers to a central financial intelligence unit.[627]

Conclusion

The Cook Islands, which was on both the FATF NCCTs list and the OECD's list of tax havens, remains on the FATF NCCTs list as of July 2004.

(i) Vanuatu

Anti-Money Laundering Legislation

The primary legal framework for anti-money laundering (AML) measures in Vanuatu is based upon the Serious Offences (Confiscation of Proceeds) Act, which criminalises money laundering and provides for the confiscation of the proceeds of crime; the Mutual Assistance in Criminal Matters Act, which provides for international cooperation; and the Financial Transactions Reporting Act, which provides four major pillars, i.e., customer identification,

[627] Lowtax.net, above n 624.

record keeping, suspicious transaction reporting and the establishment of a Financial Intelligence Unit (FIU).[628]

In addition, the FIU and the Reserve Bank of Vanuatu have issued Guidelines and Practice Notes, respectively, on the anti-money laundering obligations of regulated entities.

These measures are augmented by provisions in the Financial Institutions Act that require the retention of certain documents and enhanced due diligence for suspect transactions and customers. In addition, the Act requires fit and proper tests for significant shareholders and management of domestic banks upon licensing, and the Insurance Act requires fit and proper tests for officers of domestic insurers upon licensing. The Banking Act and the Financial Institutions Act prohibit a person convicted of dishonesty from acting as an officer of a bank.[629]

Tax Evasion

Not having any taxes other than customs duties and stamp duty, Vanuatu has not entered into any Double Tax treaties with other countries.

[628] By criminalising money laundering, the Serious Offences (Confiscation of Proceeds) Act fulfils the FATF Recommendation 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.

[629] International Monetary Fund, *Volume 1: Review of Financial Sector Regulation and Supervision of Vanuatu* (2003) <http://www.imf.org/external/country/VUT/> at 6 November 2003.

However, tax evasion is not a crime in Vanuatu, since there are no tax laws, and the Vanuatu authorities are unlikely to assist an investigation into a tax matter.[630]

Mutual Legal Assistance

The Mutual Assistance in Criminal Matters Act contains a procedure for co-operation with foreign investigators, and the Serious Offences (Confiscation of Proceeds) Act has anti-money-laundering provisions which could encompass fiscal crime.

The Mutual Assistance In Criminal Matters Act No. 52 Of 1989 is an act to make provision with respect to the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in the Republic of Vanuatu and to make provision concerning mutual assistance in criminal matters between the Republic of Vanuatu and countries other than Commonwealth countries.[631]

Secrecy and Confidentiality

The International Companies Act makes it a criminal offence for any person to divulge, attempt, offer or threaten to divulge or induce or attempt to induce other persons to divulge information concerning an international company.

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[630] Lowtax.net, Double Taxation Treaties in Vanuatu <http://www.lowtax.net/lowtax/html/jvahom.html> at 10 July 2004.
[631] *The Mutual Assistance in Criminal Matters Act 1989* (Vanuatu)

The secrecy provisions of the Companies Act, the Trust Companies Act and the International Companies Act are not unrestricted. Officers and employees of companies may be required to provide evidence about those companies if ordered by the Supreme Court of Vanuatu. However, court proceedings involving international or exempted companies are all heard in camera. The Serious Offences (Confiscation of Proceeds) Act and the Mutual Assistance in Criminal Matters Act were enacted in 1989 to, among other things, prevent the laundering of proceeds of criminal activities.[632]

IMF Report

In August 2003, a team from the IMF made widespread criticism of the regulation, licensing and supervision of the offshore banking sector in Vanuatu. In a report published in August 2003, the IMF reported that the jurisdiction was non-compliant in most of the key regulatory areas.[633]

The offshore banking sector consists of 34 licensed banks, of which only three have a real physical presence in Vanuatu. The remaining are shell banks with no presence beyond either a resident nominee director or resident agent who acts mainly as a service address. All 34 are prohibited from undertaking business with Vanuatu residents, while those licensed since 1993 are also restricted, under a general condition of their license, from soliciting funds from the public in any jurisdiction. They may, however, take deposits from associated and non-associated persons provided they do not publicly advertise

[632] Lesstax4u.net, Inc, *Vanuatu Tax Haven* <http://www.lesstax4u.net> at 10 July 2004.
[633] International Monetary Fund, *Volume 1: Review of Financial Sector Regulation and Supervision of Vanuatu* (2003) <http://www.imf.org/external/country/VUT/> at 6 November 2003.

for deposits. Total known assets of the 34 banks as of December 2001 were approximately US$2.4 billion, of which US$1.8 billion were recorded as market-related instruments and investments.

'The Banking Act (the primary legislation under which the Vanuatu Financial Services Commission (VFSC) exercises its powers over the offshore or exempt banks) provides a basic licensing and enforcement regime, but explicitly exempts offshore banks from capital, liquidity and other prudential standards. There is also considerable uncertainly about the extent to which the VFSC can acquire information from the banks under this Act in order to carry out its supervisory duties. Attempts to update the legislation have progressed little over a period of four to six years,' the report said.[634]

The VFSC clearly defines the role of the regulatory authority and provides it with appropriate objectives. However, the Banking Act lacks any real basis by which the VFSC can fulfil its objectives. This law was originally intended to cover both domestic and offshore banks, but its objective with respect to the offshore sector is apparent from the broad exemptions from any prudential requirements that it grants to offshore institutions. The VFSC is only able to exercise any authority with respect to prudential matters by the issue of directives on a general or case-by-case basis. The legal authority for this approach is uncertain.[635]

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[634] Ibid.

[635] 'IMF Savages Vanuatu in Recent Report' (2003) 8 *Offshore Red: An OFC News Update* 127.

Offshore banks are specifically exempted from the capital and other prudential norms specified in the Act. There is provision for the VFSC to issue directives, but the Act appears to limit this power to specific circumstances, and does not explicitly permit it to be used to set general prudential rules. A 1995 amendment to the Act gives the VFSC the power to conduct examinations of the banks and to require the submission of information. However, many of the banks believe that the disclosure of customer information, in particular, is prohibited under Section 381 of the Companies Act, which provides for extensive secrecy in relation to the affairs of exempt companies, which includes the offshore banks.

This report has added further to the challenges experienced by Vanuatu. Its reputation as a non-cooperative jurisdiction has led to public skirmishes with the OECD and the FATF. In addition, the Australian National Tax Office has named Vanuatu as its number one target.[636]

However, the government has apparently established a high level Committee to review the report and recommend to the Minister of Finance and Economic Management what actions should be taken to give recommendations to the report. The Committee is comprised of senior officials, from the Reserve Bank of Vanuatu, Vanuatu Financial Service Commission, the State Law Office, the Office of the Prime Minister and the Ministry of Finance and Economic Management.[637]

[6] Ibid.
[7] Ibid.

Conclusion

Vanuatu, which was on the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.3 Europe

(i) Jersey

Money Laundering Legislation

Jersey's anti-money laundering legislation places an "indirect" obligation on everybody in the Island to make a suspicious transaction report (STR) to the police where they have knowledge or suspicion of money laundering. Any person knowing or suspecting that they are involved in money laundering does not commit an offence where they disclose knowledge or suspicion to a police officer before the act is done (and the act is done with the consent of a police officer), or after the act is done, so long as it is on their initiative and as soon as is reasonable. For example, a solicitor who suspects that he is being asked to put funds into his client account in order to conceal their criminal origin would commit an offence if he did so without disclosing the act to a police officer and/or failed to obtain the consent of a police officer (in practice this is the Joint Financial Crimes Unit) before carrying out the transaction or, if he did not make the disclosure before the transaction was carried out, he failed to do so as soon as it was reasonable after the transaction.

Under the Terrorism (Jersey) Law 2002, a person employed by a financial services business is also subject to an "objective" test, and it is an offence not to report where there are reasonable grounds for knowing or suspecting that another person has committed a money laundering offence involving terrorist property.

Jersey's anti-money laundering legislation allows a STR to be made either to a police officer, or where the individual works for an employer which has a money laundering reporting officer (MLRO), to the MLRO. Once a report is made to an MLRO the responsibility rests on that officer to decide whether to make a report to a police officer (in practice this is the Joint Financial Crimes Unit).

The Money Laundering (Jersey) Order 1999 also obligates financial services businesses to identify a person to whom a STR is to be made (MLRO), to assess the STR, and to make external STRs to a police officer (again, in practice the Joint Financial Crimes Unit).[638]

In June 2003, the Financial Services Commission (FSC) issued a consultative document on proposals to reform the approach to recording company

638 Jersey Financial Services Commission, the Office of the Data Protection Registrar, the Law Officers' Department, and the Joint Financial Crimes Unit *Anti-Money Laundering Legislation and the Data Protection (Jersey) Law 1987, Guidance for Financial Services Businesses* (2003) Jersey Financial Services Commission <www.jerseyfsc.org/pdf/aml_and_dp_guide.pdf> at 9 November 2003.

information.[639] The new proposals, when adopted, reflect the jurisdiction's desire to be in the forefront of modern regulatory practice. The key changes proposed are:

- The creation of a publicly available register of directors of all Jersey companies – similar to its UK counterpart;
- A requirement to inform the Companies Registrar of details of beneficial ownership and control of Jersey companies (including any changes), and of companies' business activities; and
- The requirement of all foreign incorporated companies administered or operating in Jersey to register their details with the Commission – with a view to making this information publicly available in the future.

The consultation paper also covered a number of technical points – among them; establishing a framework for the electronic filing of documents, including the annual return; and bringing in a number of other changes, generally reflecting current changes proposed to the UK Companies Act.[640]

Tax Evasion

[639] This fulfils the FATF Recommendation 10: Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).
[640] 'Jersey Issues Report on Company Data' (2003) 8 *Offshore Red: An OFC News Update* 101.

Proceeds of criminal conduct as defined under the Proceeds of Crime (Jersey) Law 1999 includes any pecuniary advantage. In the area of fiscal crime this would include the non-payment of taxes which would give rise to a pecuniary advantage. All cases depend on their own particular facts. However, there are likely to be few circumstances in which financial institutions are able to facilitate the retention or control of a criminal's pecuniary advantage, in connection with tax evasion.

This issue has tended to arise in two distinct circumstances. The first case arises where a settlor, or account holder, transfers funds to a financial institution in circumstances where the transferor has failed to pay tax in connection with these funds. This may arise because the transferor has failed to pay gift tax arising on the transfer of the funds. Although a pecuniary advantage has arisen, it is not clear how the financial institution will have facilitated the retention or control of this pecuniary advantage.

The second case arises where account holders have failed to declare interest arising from monies held on account, or a beneficiary has failed to make a declaration of a distribution. If a financial institution assists the criminal by making a false declaration to a foreign tax authority, an offence under Article 32 may be committed. Simply holding monies in an account for a client, who is not declaring interest is unlikely to be sufficient.[641]

[641] Bailhache Labesse, *Proceeds of Crime (Jersey) Law 1999* (2000) <http://www.bailhache.com> at 10 July 2004.

It is worth mentioning that the only fiscal offence capable of constituting criminal conduct, as defined under the law, is fiscal fraud. The constituent elements of common law of fraud in Jersey were set down by the Court of Appeal in the case of Attorney General -v- Foster (1992) JLR 6CA. For the offence to be committed there must be:

- a false reputation;
- an intention to cause by false representation actual prejudice to someone and actual benefit to someone;
- actual prejudice suffered as a result of the false representation;
- actual benefit accruing to the perpetrator of the fraud or to someone else; and
- a causal link between the falsity and the injury.

Generally speaking, individuals operating within their financial services business may be unlikely to be familiar enough with the affairs of a client to formulate knowledge or generally a suspicion that the client's conduct contains the necessary elements of fiscal fraud.[642]

Mutual Legal Assistance

In May 2002, Jersey, along with its fellow UK dependent territories Guernsey and the Isle of Man, agreed to be part of the EU's information-sharing regime whereby financial institutions would be obliged to pass details of income or

[642] Ibid.

investments by nationals of EU member states to their home tax administrations. It is as yet unclear whether such a regime will come into effect pending agreement from Switzerland and the US to be part of it.

In November, 2002, Jersey signed a Memorandum of Understanding (MoU) with the Gulf state of Bahrain, designed to facilitate cooperation between the two countries on issues such as applications for licences from financial institutions, and the investigation of irregularities.[643]

Financial Services Commission (JFSC) director-general, Richard Pratt announced that: 'We will be providing information on request, but we would also offer information spontaneously, as a partner regulator, if for example we found out anything of value to them.'[644]

In October 2003, the Jersey Financial Services Commission announced that Jersey had signed a Memorandum of Understanding (MoU) with the International Organisation of Securities Commissions (IOSCO). The MoU, which was initially agreed in 2002, was designed to combat securities and derivatives violations. It obliges signatories to share information about the illegal use of their securities and derivatives markets with each other. In signing up to the MoU, Jersey joined another 24 members. However, according to the JFSC, the island is one of the first offshore finance centres to

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643 Lowtax.net, *Double Taxation Treaties in Jersey* <http://www.lowtax.net/lowtax/html/jjehom.html> at 10 July 2004.

644 This fulfils the FATF Recommendation 32: Each country should make efforts to improve a spontaneous or "upon request" international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.

join. "By signing this memorandum with IOSCO, Jersey reinforces its status as a leading international financial centre and gives international investors greater confidence in the island," JFSC compliance director, John Pallot explained.[645]

Secrecy and Confidentiality

No legislation governs bank secrecy, but it is possible to have a numbered bank account in Jersey. Professional privilege pertains between professional advisors and their clients. Such confidentiality is limited by the fact that disclosure may be compelled by court order, where there is a duty to the public to disclose suspicious transactions, or where the customer has consented. Beneficial ownership must be disclosed to the authorities and references may be required. However, absent evidence of criminal conduct is not to be disclosed.[646]

Future of Jersey

Britain is responsible for its external affairs including negotiations with the European Union; under the UK's accession treaty with the EU, Jersey forms part of the single market but is outside the EU fiscal area. Jersey's unique situation with regard to the EU is both a strength and a weakness. The island will remain a favoured base for holding and trading companies working into the EU, and for e-commerce activity; but it has the EU and the OECD to

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645 Lowtax.net, above n 643.
646 Carlton Press <http://www.offshore-manual.com> at 28 April 2004.

contend with. After several years of 'hands-off' policy in regard to Jersey taxation, the UK government in 2002 threatened Jersey with sanctions if it did not comply with EU information-sharing rules.

Jersey signed a 'commitment' letter to the OECD in February 2002, but it contained an 'Isle of Man' level playing field clause making changes dependent on comparable changes in Switzerland and the USA. By mid-2003, however, the OECD seemed to have reached a compromise position with Jersey, and was assisting it to design a nil% corporate tax system.

In May, 2002, it became clear that Jersey, along with its fellow UK dependent territories Guernsey and the Isle of Man, was ready to sign up to the EU information-sharing regime if that became necessary; but after the EU finally reached its compromise agreement on the Savings Tax Directive in early 2003, Jersey decided, along with Guernsey and the Isle of Man, to apply a withholding tax to the returns on personal savings for EU residents when the Directive comes into force in 2005.[647]

Conclusion

Jersey, which was on both the FATF list of countries reviewed in 2000 and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

647 Lowtax.net, above n 645.

(ii) Switzerland

Money Laundering Legislative

The "Federal Act on the prevention of money laundering in the financial sector" (MLA), entered into effect on 1 April 1998 and serves as a supplement to the provisions of the criminal code. It applies equally to all financial intermediaries, i.e. any person who, on a professional basis, accepts, maintains deposit of or helps to invest or transfer assets belonging to a third party (e.g.: banks, fiduciaries, wealth managers, traders in securities, funds directorates, lawyers and notaries, the post office or the Swiss Federal Railways and change bureaus).

The act imposes on financial intermediaries new organizational duties (training personnel, internal controls) and policy duties (verify identity of the contracting partner, verify beneficial owner, even clarification of the economic background of a transaction that shows signs of laundering, retaining documents attesting to the verifications made).

In accordance with this law, all financial intermediaries were henceforth obliged to inform the Federal Reporting Office for Money Laundering when, in a business relationship, they knew or presume, on the basis of sound evidence, that money laundering was taking place. This office is attached to the Federal Office for Police.

Since the first year the Money Laundering Act has been enforced, 80% of the 210 declarations recorded were made on behalf of banks. Cantonal investigations are currently underway in 161 of the cases. In total, 423 million Swiss francs have been frozen.[648]

Tax Evasion

On June 3, 2003, The European Union ECOFIN of Economic and Finance Ministers (the "ECOFIN") formally adopted the tax package of the Directive on the Taxation of Savings (the "Directive"). The Directive was to be effective from January 1, 2005, assuming each EU jurisdiction enacts the relevant provisions by January 1, 2004, and providing agreement is reached within certain third party jurisdictions to be similarly bound by the terms of the Directive. Switzerland is the most relevant of these third party jurisdictions.[649]

Under the Directive, most EU jurisdictions will automatically exchange information with each other about the beneficial ownership of accounts. Where an individual, resident in the European Union, has an account in another EU jurisdiction, that EU jurisdiction will deliver the account holder information to the jurisdiction where the account holder is resident. The jurisdictions with banking secrecy will not automatically exchange

648 Micheloud and Cie, *Measures used for the fight against money laundering* <http://switzerland.isyours.com> at 9 November 2003.

649 With the Directive on the Taxation of Savings, Switzerland can fulfil the OECD Recommendation 7: Access to banking information for tax purposes - Countries review their laws, regulations and practices which govern the access to banking information with the view to removing impediments to the access to such information by tax authorities.

information in this way. The jurisdictions with banking secrecy will instead impose a withholding tax on savings income.

When it is adopted, Switzerland will impose the withholding tax regime, rather than the automatic exchange of information regime. Indeed, the Swiss Federal Department of Finance released on its official website[650] the heads of the draft agreement. Also of interest is the comment made on the willingness of Switzerland to provide administrative assistance (exchange of information), in cases of tax fraud.[651] Surprising though it may be, it will surely rely on an act falling within the definition "tax fraud" under both the Swiss conception as well as the conception of a foreign jurisdiction. Tax fraud in Switzerland requires something more than the simple act of tax evasion. It is debatable how truly impressive Swiss banking secrecy remains, or will remain,[652] but since it seems that the wider perception is held that it does remain, then the maintenance of banking secrecy (or the veneer of banking secrecy) cannot be understated as far as the vitality of the Swiss banking industry is concerned.[653]

The Swiss and US Competent Authorities entered into a mutual agreement ("Agreement") on January 23, 2003, under the current (1996) US-Switzerland

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[650] Swiss Federal Department of Finance <http://www.efd.admin.ch/e/index.htm> at 10 July 2004.

[651] Administrative Assistance: "Switzerland is committed to providing administrative assistance on request to EU Member States in cases of tax fraud or the like relating to interest payments as defined by the agreement. After the agreement has been signed, Switzerland and the EU Member States will agree on the adoption clauses concerning administrative assistance in tax fraud and the like in the bilateral double taxation agreements, which are not restricted to the scope of agreement on the taxation of savings income."

[652] Particularly in the light of recent developments between Switzerland and the USA. It is the opinion of some practitioners that this agreement on the interpretation will foresee similar agreements between Switzerland and other jurisdictions, since the extent to which Switzerland, according to the agreement, will exchange information seems to go further than the extent to which it has agreed to do so with these other jurisdictions.

[653] Michael Grob, Marnin J Michaels, Philip Marcovici, Paul Gerrits and Stephanie Jarrett, 'The EU Saving Directive and its Impact on the Banking Industry: Part I' (2003) *Tax Planning International Review*.

income tax treaty. The US Treasury said that the Agreement sought to facilitate "more effective tax information exchange" between the two countries.[654]

Article 26 (Exchange of information) of the treaty, which was signed on October 2, 1996, and eutered into force on December 19, 1997, provides that the Competent Authorities of the US and Switzerland will exchange such information as is necessary "for the prevention of tax fraud or the like in relation to the taxes which are the subject of" the treaty. Under the Agreement, the exchange of information will be in regard to both civil and criminal matters. The statute of limitations applicable under the laws of the requesting country will apply, instead of the statute of limitation of the requested country.[655]

Under Swiss Law, fraud would generally only be found when forged or falsified documents were used to deceive tax authorities, or a scheme of lies was used to deceive tax authorities. In the US, however, fraud may also arise from non-filing or omission of income. At first glance, certain inconsistent subtleties between the two different legal definitions suggest practical challenges that may undermine the purpose of the information exchange.[656] In the past, the Swiss authorities took the position that the examples were the only opportunities for exchange of information while the US took the view

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654 See BNA Daily Tax Report, January 27, 2003, p. GG-1.

655 Cynthia Shelton, Marnin J Michaels, Stephanie Jarrett and Denis Berdoz, 'Switzerland and US Agree to Swap Tax Information' (2003) *Journal of International Taxation*.

656 F Roy Sedore, Marnin J Michaels and Sahel Assar, *How the US Focus on Tax Shelters Affects Non-US Banks* (2003) International Tax Review <http://www.internationaltaxreview.com> at 9 November 2003.

that the examples were by way of illustration only. This new agreement confirms that the previous interpretation espoused by the US is henceforth the agreed view.[657]

Mutual Legal Assistance

Switzerland has passed its own mutual assistance law, and is also a party to a number of international mutual assistance treaties, some multilateral and some bilateral, including the following:

- The European Convention on Mutual Assistance in Criminal Matters, 1959;
- Treaty on Mutual Assistance in Criminal Matters with the USA, 1973;
- The Federal Act on International Mutual Assistance in Criminal Matters, 1983, as amended in 1997;
- The European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, 1993.

The Federal Act, particularly since the 1997 amendments, enables the transmission of documents and information abroad for the purposes of criminal proceedings.[658] From the point of view of banking secrecy the following can be said about the current situation:

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[657] Baker & McKenzie, "Switzerland and United States Sign Tax Information Exchange Agreement", International Tax, Asia Pacific, February 2003, in Baker & McKenzie, Eight Annual International Tax and Trusts Training Course, Singapore, September 2003.

[658] Though the Federal Act allows exchange of information between countries, it is not permitted in the use of tax matters, thus defeating the intention of the OECD Recommendation 8: Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax bavens and preferential tax regimes constituting harmful tax competition.

- According to a recent decision of the Federal Supreme Court the transmission of such information requires the permission of the Swiss police authorities who must inform the customer about the order and give him a right to appeal;
- It is not permitted to forward information on persons who are not the subject matter of the investigation;
- Information will not be given if

  - The foreign authorities might use the information for purposes other than those for which it was requested;
  - The offence alleged is not equally punishable in Switzerland;
  - The requesting state does not offer Switzerland reciprocal treatment in these matters;
  - The offence is related to tax, politics or military matters.

The Swiss authorities now grant administrative assistance as well as judicial assistance. Administrative assistance is regulator to regulator contact as opposed to judicial assistance which takes place between judicial authorities within the scope of civil or criminal legal proceedings.[659]

Switzerland has ratified several other bilateral and multilateral international agreements through which it is committed to providing judicial cooperation - also referred to as mutual assistance - in criminal matters. The most significant agreement was constituted by the European Convention on Mutual Assistance

[659] Lowtax.net, *Double Taxation Treaties in Switzerland* ittp://www.lowtax.net/lowtax/html/jswhom.html> at 10 July 2004.

in Criminal Matters on 20 April 1957. In accordance with the "Federal Act on international mutual assistance in criminal matters" (1983), Switzerland grants international judicial cooperation in criminal matters. In such procedures, capital assets can be frozen and, if need be, released to the foreign authorities. Judicial cooperation is granted when the crime under prosecution is also punishable in Switzerland and the foreign authority guarantees that it will not use the information issued from Switzerland for any purpose other than the investigation.

Switzerland played an active part in concluding the Declaration of the Basle Calmat on Banking Supervision, which, in 1988, established the first international code of conduct for banks, with an aim to prevent any abuse of the banking industry for money laundering purposes.[660]

Secrecy and Confidentiality

Two articles of the Swiss criminal code regulate Swiss bank secrecy:

Article 162 takes punitive action against the disclosure of trade secrets or confidential business information.

"Any person who has divulged a trade secret or confidential business information that was meant to be kept by virtue of legal or contractual obligation, any person who has used this information to his or her benefit or to

[660] Micheloud and Cie, *Measures used to combat money laundering at an international level* <switzerland.isyours.com> at 9 November 2003.

that of a third party, will be, on prosecution, punished by imprisonment or by fine."

Article 320 deals with occupational confidentiality.

1. Any person who has divulged a secret entrusted to him or her as a representative of authority or a civil servant, or who has acquired knowledge by means of his or her practice or employment, will be punished by imprisonment or by fine. The disclosure remains punishable even when the practice or employment has terminated.
2. The disclosure will not be punishable if it was made with the written consent of a superior authority.[661]

Exemptions are provided for under the Swiss Civil Code, debt collection and bankruptcy law, criminal law, administrative criminal law and mutual assistance cases. In such cases, against the wishes of the client banking secrecy may also be waived by order of the courts. Banking secrecy is most often waived in prosecution cases.

Switzerland cooperates fully in the investigation of international criminal activities. Swiss banks are obligated by law to provide information of any nature relating to criminal investigations if requested to do so by the judicial authorities. The banks meet their obligation to provide requested information on the basis of very strict "know your customer" rules.[662]

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[1] Micheloud & Cie, *Swiss Bank Secrecy* <http://switzerland.isyours.com> at 9 November 2003.
[2] Switzerland Embassy, *Swiss Banking Secrecy*, <http://www.cda.admin.ch> at 1t November 2003.

Switzerland to be on OECD's Blacklist?[663]

In June 2003, the OECD threatened to place Switzerland on a blacklist, due to what the organisation considers to be its tolerance of 'harmful tax practices'.

While the country's appearance on the forum's blacklist would not create any legal obligations for Switzerland, its inclusion on such a blacklist could only be detrimental to the jurisdiction's international standing.

'This is not acceptable,' finance ministry spokesman Daniel Eckman said. 'We have major difficulties understanding how after five years of discussions about what should be considered a harmful tax practice, the forum comes up with a report that considers Switzerland the only country in the whole OECD with harmful aspects in its tax legislation. We won't make concessions in this field,' Eckman said.[664]

Money Laundering related suspicious activity reports (SAR) rose over 30% in 2002 in Switzerland, with 95% of the total SARs connected to the 11 September 2001 attacks, according to a statement from the Money Laundering Reporting Office (MROS) of the Swiss Federal Office of Police. The figures rose from 311 reports in 2001 to 417 in 2002, with the MROS forwarding 380 of these cases to law enforcement agencies.[665]

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[663] See Appendix U for the list of OECD's Tax Havens as at 2004.
[664] 'OECD Threatens Swiss Over Tax' (2003) 8 *Offshore Red: An OFC News Update*.
[665] Money Laundering Report Office Switzerland, *5th Annual Report* (2002 MROS).

The report also showed that the majority of reports were generated from non-financial institutions, such as law firms, money transfer businesses and others involved in fiduciary transactions and asset administration in Geneva, Zurich and Bern. 'As a result of the attacks in US, terrorism is the crime most frequently mentioned as a prior act in the reports about suspected money laundering. Further crimes mentioned include fraud, corruption and embezzlement,' the MROS said.[666]

Conclusion

As with Singapore, Switzerland which was not on the OECD list of tax havens or the FATF list of jurisdictions and territories for review, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.4 Indian Ocean

Mauritius

Money Laundering Legislation

Mauritius has a range of legislation governing the domestic and offshore financial services industry but legislation dealing with money laundering specifically is in its infancy. In the past legislation has regulated banks and other financial institutions on a

[666] Ibid.

prudential basis. However, new legislation, namely Economic Crime and Anti-Money Laundering Act 2000 (ECAML Act) and the Dangerous Drugs Act 2000 have been introduced to combat money laundering. However, legislation relating to international co-operation needs to be reviewed to ensure compliance with FATF Recommendation 38. At the time of the visit no Extradition Act was in place and the team was told that the Vienna Convention could not be ratified until this had been done. It is noted that since the evaluation took place the Evaluation Team had been informed that the Government has deposited its instrument of ratification in respect of the Vienna Convention with the office of the United Nations Secretary General on 6th March 2001. Accordingly, the Convention was due to come into force for Mauritius on 4th June 2001.

The regulation of the finance industry is currently fragmented into banking and non-banking sectors, with responsibilities divided amongst separate regulatory bodies, namely, the Central Bank and the MOBAA, the Controller of Insurance and the Stock Exchange Commission. Recognising this factor, the Government is setting up a Financial Services Commission which will be responsible for the licensing, regulation and supervision of non-banking financial services initially and, at a later stage, to integrate the Financial Services Commission with the Bank of Mauritius, the supervisory authority of the banking sector, in a move to a single unified regulatory authority for the whole financial services in Mauritius. In the meantime, there are provisions in the ECAML Act 2000 for tackling money laundering threats and for the involvement of different regulatory bodies e.g. lodging of reports of suspicious transactions with the Central Bank. The Bank can further refer the matter to the appropriate bodies regulating the financial institutions who can take appropriate action under their relevant legislation. (Sections 22(1) and 21(6) respectively). However, the Evaluation Team considers that strengthening and improving co-operation between different regnlatory bodies should be developed in the short term.[667]

On 19 June 2003, the government announced further legislation to strengthen its anti-money laundering (AML) regime. Among the measnres being considered were: a convention for the Suppression of Terrorism Bill, a Mutual Legal Assistance Bill and an Extraction Bill. These three measures have been drafted and will be finalised during the summer. Mauritius has made significant headway in developing its AML approach and at the end of 2002 was assessed by a team from the IMF / World Bank under a Financial Sector Assessment Programme (FSAP). This exercise was designed to help countries enhance their resilience to financial crisis, and to foster growth by promoting financial soundness and stability.[668]

The assessment included a review of AML/CFT (Combating the Financing of Terrorism) regime in place. The FSAP reports were presented to the 1MF executive board in October 2003, and Mauritius would then seek an upgrading of its ranking by the Financial Stability Forum (FSF).

Mauritius was ranked in the third and lowest category of offshore financial centres by the FSF in April 2000 with regard to the quality of its financial supervision.[669]

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[667] Financial Action Task Force, *Annual Report 2001-2002* (2002 FATF) 51-2.
[668] 'Mauritius Toughens Laundering Rules' (2003) 8 *Offshore Red: An OFC News Update* 103.
[669] Financial Stability Forum, *Financial Stability Forum Releases Grouping of Offshore Financial Centres (OFCs) to Assist in Setting Priorities for Assessment* (2000) <http://www.fsforum.org> at 28 April 2004.

Sushil Khushiram, minister of economic development, financial services and corporate affairs, said the government anticipated a favourable assessment and therefore adjustment to the country's FSF ranking will further strengthen its credibility in attracting new and better business in financial services.

"As part of the FSAP exercise, amendments have been proposed to the exiting legislation to fine-tune some provisions and clear certain ambiguities. A team of two AML/CFT experts visited Mauritius in March 2003 and submitted their final report in April. A broad-based National Coordination AML/CFT committee was set up to ensure proper implementation of the key points."[670]

Tax Evasion

The Financial Intelligence and Anti-Money Laundering Act 2002 (FIAML Act)[671]

The FIAML Act makes provision for the establishment and management of a Financial Intelligence Unit (FIU) as the central agency responsible for receiving, requesting, analysing and disseminating to the investigatory and supervisory authorities, disclosures of financial information:

- concerning suspected proceeds of crime and alleged money laundering offences. Banks, financial institutions, cash dealers and relevant professionals are required to report suspicious transactions in relation to money laundering activities to the FIU;

[670] 'Mauritius Toughens Laundering Rules' (2003) 8 *Offshore Red: An OFC News Update* 103.
[671] *The Financial Intelligence and Anti-Money Laundering Act 2002* (Mauritius).

- required by or under any enactment in order to counter money laundering; or

- concerning the financing of any activities or transactions related to terrorism, as specified in Part III of the Prevention of Terrorism Act 2002.

This Act also makes provision for mutual assistance with overseas bodies in respect of investigation and prosecution of money laundering cases.

The FIU has already been set up and is operational.[672]

Mutual Legal Assistance

The Mutual Assistance in Criminal and Related Matters Bill which aims at enabling the widest possible measure of international cooperation being given and received by the Republic of Mauritius promptly and to the fullest extent possible, in investigations, prosecutions or proceedings concerning serious offences and related civil matters.[673]

Mauritius has, as a tax planning jurisdiction focused the development of its global business sector (formerly known as the offshore sector) on the use of its growing network of double Taxation Avoidance Treaties. The expanding network of these double taxation agreements (DTA's) reinforces the seriousness of Mauritius as a tax efficient jurisdiction for structuring investment abroad in the global business sector.

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[672] Republic of Mauritius, Ministry of Economic Development, Financial Services & Corporate Affairs, *Financial Services Division* (2003) <http://economicdevelopment.gov.mu> at 2 November 2003.
[673] Mauritius Prime Minister's Office, *Cabinet Decisions taken on 01 August 2003* (2003) <http://ncb.intnet.mu/pmo/decisions.htm> at 9 November 2003.

Mauritius has been used as a route for investment into emerging regions such as India, China and Pakistan.

As at 11 February 2004, Mauritius has ratified 32 treaties[674] and is negotiating several others.[675]

The Prevention of Terrorism Act 2002 provides for measures to combat terrorism and for related matters. Its objects are to:

(a) suppress the financing of terrorist acts;

(b) criminalise the financing of terrorist acts;

(c) freeze funds and assets of terrorists and terrorist organisations;

(d) establish terrorists acts as serious criminal offences in domestic laws and regulations; Afford international assistance in investigations, prosecution of financing of terrorism;

(e) to exchange information and collaborate internationally on terrorist acts.

The new legislation enacted to combat financial crime, money laundering and terrorist financing enhances the security of the Mauritian financial services sector as well as

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[674] See Appendix P for the list of 32 ratified treaties.

[675] Mauritius Financial Services Commission, *Double Taxation Avoidance Treaties* <www.fscmauritius.org/tax.htm> at 9 November 2003.

comforts the reputation of Mauritius as credible financial hub of international repute.[676]

Secrecy and Confidentiality

The Mauritius Offshore Business Activities Act 1992 (MOBA) requires that all information and documentation received be kept secret and confidential except on proof beyond reasonable doubt that the confidential information is bona fide required for the purpose of any enquiry relating to drug trafficking, arms dealing and money laundering under the uew Economic Crime and Anti-Money Laundering Act 2000.[677] An imposed penalty of a fine of up to 300,000 rupees and imprisonment for a term of not exceeding 8 years for failure to comply.[678]

Mauritius Strengthening its Appeal as a OFC

Mauritius adheres to the international requirements. A review of its financial sector by the IMF/World Bank under a financial sector assessment program was conducted in 2003. The report was positive. The Financial Services Commission exerts the regulatory authority on all non-banking activities.

In 2003 Mauritius joined the Egmont Group. Its prestige is greatly enhanced by this membership, which is further proof of the high regard which Mauritius commands in

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676 Ministry of Economic Development, Financial Services & Corporate Affairs, Financial Services Division <http://economicdevelopment.gov.mu> at 3 November 2003.

677 International Company Serviees Limited, *Mauritius* (1999) <http://www.icsl.com> at 3 November 2003.

678 Finor Associates Ltd, *Jurisdictions: Mauritius* (2003) <http://www.fincor.com> at 3 November 2003.

the international financial arena and confirms its standing as one of today's best financial centres.[679]

Conclusion

Mauritius, which was on the FATF list of jurisdictions and territories for review, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.5 Asia

(i) Hong Kong

Money Laundering Legislation

Over the last four years approximately 3000 investigations into money laundering have resulted in a mere 49 convictions. Hong Kong must now face up to the danger of being blacklisted by the FATF if it does not tighten up its current laws that have allowed many money-launderers to get away with their criminal activities.

This warning came from Hong Kong's commissioner for narcotics, Claire Lo Ku Ka-Lee, who has reported to a Bills Committee meeting on a new money-

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[679] Ludovic Verbist, *The Sunny Side of Financial Services, International Financial Service Centres: The Case for Mauritius* (2004) Asian Legal Business <http://www.asianlegalonline.com> at 10 May 2004.

laundering law recently, that Hong Kong must improve its financial services laws to avoid the threat of sanctions from the FATF and the OECD.

Lo has argued that if Hong Kong does not improve itself, there is a possibility it could be blacklisted some time in the future. Hong Kong as an international financial centre, needs in order to maintain its status, combat money laundering.[680]

In 1999 the FATF carried out an assessment of the Hong Kong's Special Administrative Region which indicated that the jurisdiction's regulations were not quite up to par in the global fight against money laundering.[681] The multilateral cited Hong Kong's low tax system, sophisticated banking facilities and the absence of currency and exchange controls as 'susceptible' to money-laundering activities.

The report stated that, since the first evaluation in 1994, Hong Kong had taken a number of important steps in its anti-money laundering regime. The expansion of its anti-money laundering legislation under both the Drug Trafficking (Recovery of Proceeds) Ordinance (DTRoP) and the Organised and Serious Crimes Ordinance (OSCO), which include the extension of the money laundering offence from only drug trafficking to the proceeds of serious crimes and statutory mandatory suspicious reporting, have provided a solid foundation for penal action.

[680] Hong Kong Economic and Trade Office, 'FATF Annual Report under Hong Kong's Presidency Released' (2002) 6 *The Circle* 4.
[681] Financial Action Task Force, above n 615.

Although the report described the legislative steps taken by Hong Kong to be 'fundamentally sound' it raised concerns that the reporting of suspicious transactions mandatory for both drug offences and other serious crime were inadequate. The report stated: "the number of reports received are still small, relative to the size of the Hong Kong financial markets and reporting levels in other jurisdictions… the low number of suspicious transactions reports and of convictions for money laundering, suggest that the effectiveness of the system can be further improved.'[682]

The FATF released its thirteenth annual report on its anti-money laundering and anti-terrorist financing activities at a press conference held on June 21, 2002 at the conclusion of its plenary meeting in Paris.

"The annual report[683] outlined the main achievements of the FATF in 2001-2002 under the presidency of Hong Kong, China, including the significant progress that has been made in combating terrorist financing and in the work on Non-Cooperative Countries and Territories (NCCTs)," said Mrs. Clarie Lo, the outgoing FATF President and Hong Kong's Commissioner for Narcotics.

In the report[684], eleven FATF members, including Hong Kong, had implemented all of the twenty-eight recommendations requiring specific action.[685]

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682 Financial Action Task Force, *Annual Report 1998-1999* (1999 FATF) 15.
683 Ibid.
684 Ibid.
685 Hong Kong Economic and Trade Office, above n 680.

Hong Kong has money laundering rules which are wider than those that apply in most other countries. For example, disclosure to the authorities must be made by any person who merely "ought to have suspected" that monies received originated from criminal activities. Furthermore, this threshold is met even if the activity abroad that generated the funds was not illegal in that country but would have be illegal had it been done in Hong Kong. On the other hand, if an offence overseas would not have been an offence if it had been committed in Hong Kong, no report need to be filed. Thus, the receipt of funds from gambling activities conducted abroad must be reported, but funds received in violation of foreign exchange controls do not.[686]

In the case of *Robert Pang Yiu Hung v Commissioner of Police* (2 December 2000), a practicing barrister was arrested for failing to disclose his suspicion that certain securities held by client were to be sold, and the proceeds transferred to the account of the client's solicitor. The relationship between the barrister and his client was professional, and the purpose for which the client was selling the shares was to pay his legal fees to his solicitor in order to defend himself in the action for which the barrister was retained. The issue that arose in this case was whether a barrister (and a solicitor) were excused from filing a money-laundering report to the authorities by claiming legal professional privilege. The court held that the privilege applied, and that no report needed to be filed. The barrister was therefore acquitted.[687]

[686] This is because Hong Kong criminalises gambling but does not have exchange control laws of her own.

[687] Michael Olensnicky, "Recent Developments Affecting the Private Banking Industry in Key Jurisdictions – Hong Kong", Baker & McKenzie, Eight Annual International Tax and Trusts Training Course, Singapore, September 2003.

This is an important decision which affirms the sacrosanct rule that a person should be permitted to make full disclosure to his legal advisor for the purpose of seeking legal advise without fearing that anything said by him in seeking that advise would be subject to disclosure. The court expressed reluctance to adopt the rule that would require barristers and solicitors in the discharge of their professional duty of acting for a client to essentially act as informers against their clients. The court recognised that legal professional privilege is nowadays recognised as a fundamental human right, and indeed is protected in such conventions as the International Covenant for Civil and Political Rights which is enshrined in Hong Kong's Basic Law, which is Hong Kong's "mini-constitution". A disclosure requirement would be fundamentally incompatible with the constitutional guarantee of an independent profession which is implicit in the Basic Law.

During the course of the hearing, the government enacted clarifying legislation that now expressly states that nothing in the money laundering legislation requires a disclosure of any items subject to legal privilege.[688]

Tax Evasion

The State Council submitted the draft amendment to the Tax Administration Law in August 2000 for review by the Standing Committee of the Ninth National People's Congress. The draft amendment included the introduction of a minimum penalty for tax evasion. According to the proposal, the penalty for

[688] Ibid.

tax evasion was to range from 50 per cent to 500 per cent of the amount of tax evaded.

A taxpayer is deemed to have committed an act of tax evasion under Article 40 of the Tax Administration Law if he "forges or alters information, conceals information or destroys account books or account vouchers without authorisation, records an excess amount of expenditure or fails to record an insufficient amount of income in account books or uses other means to falsify tax declarations and this results in non-payment or underpayment of tax."

Current Tax Administration Law labels tax evasion a criminal offence if the amount evaded is over 10 per cent of the tax payable and over RMB10,000. In July this year, a Hong Kong resident who has engaged in VAT frauds was sentenced to death, subject to a two-year suspension. While more than 70 Peoples Republic of China (PRC) citizens who committed VAT fraud have been sentenced to death, this is the first one that involves a Hong Kong resident in a PRC tax case.[689]

Mutual Legal Assistance

Hong Kong has 8 Mutual Legal Assistance in Criminal Matters Orders which have come into force with Australia, Canada, France, South Korea, New Zealand, Switzerland, United Kingdom and United States of America.[690]

[689] Peter Kung and Bolivia Cheung, *The Bulletin* (2000) The Hong Kong General Chamber of Commerce <http://www.chamber.org.hk> at 9 November 2003.
[690] Hong Kong Department of Justice, Bilingual Laws Information System, *List of Mutual Legal Assistance Agreements* <http://www.justice.gov.hk> at 9 November 2003.

The judgments and awards of the Hong Kong High Court and above may be enforced in most common law jurisdictions and in consequence of international agreements and arrangements, in a number of foreign countries including France, Germany and Italy. Reciprocal arrangements exist for the enforcement in Hong Kong of the judgments of the superior courts of those countries that will enforce Hong Kong's judgments. Similarly, maintenance orders made in matrimonial proceedings can be enforced, on a reciprocal basis, in a number of overseas countries.

Extradition agreements provide for the surrender of persons who are accused or convicted of a serious criminal offence committed within the jurisdiction of one of the Parties to the agreement who are found in the territory of the other Party. The courts in Hong Kong also have jurisdiction, on request from a foreign court, to obtain evidence in Hong Kong for civil or criminal proceedings in that court. Similarly, the courts in Hong Kong can issue Letters of Request to overseas courts for the obtaining of evidence. Mutual legal assistance in the investigation and prosecution of criminal offences in Hong Kong and overseas and in the recovery of proceeds of crime is also given and obtained directly by the International Law Division of the Department of Justice, under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525).[691]

Secrecy and Confidentiality

[691] Department of Justice, Legal System in Hong Kong, *The Courts* <http://www.info.gov.hk/justice/new/legal/right.htm> at 9 November 2003.

There is no legal provisions governing the collection and disclosure of commercial credit data in Hong Kong. However, under the common law principle, banks general regard it their duty to maintain confidential information about their customers. They would not normally disclose such information unless prior consent has been obtained from the customers.[692]

Hong Kong's Potential as an Offshore Financial Centre

Chinese officials are no longer so keen on Hong Kong becoming an offshore renminbi centre. The Chinese officials apparently fear that such action could devastate the currency and give an unfair advantage to Hong Kong and its banks.[693]

In early August 2003, the Central Government agreed to consider allowing banks in Hong Kong to trial run personal renminbi business, including deposits, remittance, exchange and credit-card business. The Central Government also agreed to give preference to Hong Kong to consider liberalisation in market access in respect of offshore renminbi financial business.

Such a move was thought to be of benefit to both Hong Kong's development as an international financial centre and to the growing economic integration between Hong Kong and the Mainland. The move was also thought to

[692] Hong Kong Monetary Authority <http://www.info.gov.hk/hkma/eng> at 6 November 2003.
[693] 'China Wavers on Hong Kong's Offshore Activities' (2003) 8 *Offshore Red: An OFC News Update* 22.

potentially reduce money laundering, promote domestic competition and provide more credit tools for borrowers and lenders.

However, the Central Government's initially positive response to Hong Kong becoming an offshore centre seems to be not as strong as originally thought. The *Financial Times* reported that, "mainland finance industry officials, especially in Shanghai, are objecting to the plan. Shanghai has been struggling to establish itself as a renminbi finance centre and fears its role may be undermined by concessions to Hong Kong." Hong Kong has a far superior infrastructure and skills base, which would likely make it more a favourable finance centre.

The relationship between the Chinese authorities and the financial centre in Hong Kong remains problematic. This is another example of Beijing's unwillingness to allow the separate culture of Hong Kong to remain intact. Competition pressures from Beijing and Shanghai will add to Hong Kong's woes. The SARS virus dealt a heavy blow to Hong Kong and its capacity to compete on a global stage is being further undermined by this latest development.[694]

The impact of SARS is mainly on the economy. However, it is also causing some political turbulence. After 500,000 took to the street to voice their

[694] Ibid.

grievances against the ruling cabinet and the ailing economy, two ministers including the Financial Secretary resigned.[695]

Such negative news was accompanied by an increase in tax rates from 16% to 17.5%, which is quite a controversial move to increase government revenue under a dragging recession and a historically high unemployment rate of over 8%.

On the positive front, Hong Kong has yet again been named the world's freest economy for the seventh consecutive year by Canada's Fraser Institute. It has also topped the Heritage Foundation/Wall Street Journal Index of Economic Freedom for the past nine years.

Moreover, to protect the lustre of this Pearl of the Orient, China signed with Hong Kong the Closer Economic Partnership Arrangements (CEPA) on 29 June 2003. This is one of the devices to boost the local economy. Under CEPA, tariffs on some 270 categories of goods manufactured in Hong Kong will be removed. Also, 17 Hong Kong service industries will get first mover access to the mainland market. These include management consultancy, accounting, legal, banking, securities and insurance.

Companies incorporated and operating in Hong Kong will be eligible for the advantage. Foreign firms without substantial operations in Hong Kong can

[695] Ching Cheong, 'China Warns HK; Don't Stray Too Far', *The Straits Times* (Singapore) 18 February 2004, 1.

take advantage of the CEPA by partnering with or acquiring eligible local companies.[696]

However, Beijing's most recent comments on "capital outflows" seem to have spelt a death nail to the SRA's sovereign risle, which for European investor, will surely see the funds move to Singapore as the more stable and attractive of the two Asian Regional Financial Centres.[697]

Conclusion

As with Singapore, Hong Kong which was not on the OECD list of tax havens or the FATF list of jurisdictions and territories for review, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.9 Conclusion

The responses of the OFCs covered by the detailed and extensive analysis in this chapter, demonstrated the compromise positions that have been reached between the supranational directives and the regulatory amendments of the key OFCs.

The level of co-operation by the prominent OFCs is now at an unprecedented level and the depth and quality of their regulation far outstrips those nations which constantly criticise the island nations through global agencies. Switzerland, an OECD

[696] Yvonne Fong, 'Financial Markets in Asia' (2004) *The OFC Report 2004* 15.
[697] Ching, above n 695.

member, still has not given up on banking secrecy and bankers in Switzerland still seem reluctant to move. Yet British chancellor Gordon Brown has said he will put renewed pressure on Jersey, Guernsey and the Isle of Man to move from their common position of a withholding tax to automatic information exchange under the terms of the European savings tax directive.[698]

The revision in thought among OFCs some years ago which obliged many to come to the realisation that the only way forward was to provide outstanding levels of services and to comply with the larger international community has been a force for the good. But the inevitable conclusion from this process appears to be that there will be fewer OFCs and that the less conforming states offering offshore services will eventually disappear.

Nevertheless as the number of viable OFCs falls from 65 or so to 15-20, those remaining will be robust structures, articulately managed centres and able to compete with the world's best. Some will be full service jurisdictions and others will be excellent niche players.

It appears that the larger developed economies which benefited through the coercion of these offshore states with the name-and-shame tactics, may cease their political manoeuvrings. The OFCs have complied in full measure but the big states are perceived to have manifestly failed to achieve a level playing field. In a forthright demonstration of their intellectual creativity the offshore centres – notable Gibraltar and the Isle of Man – have managed to create a tax environment which meets the full

[698] Bob Reynolds, 'Editor's Note' (2003) 8 *Offshore Red: An OFC News Update* 153.

demands of international transparency and a competitive marketplace. It is this degree of agility of thought and action which the OFCs will need on a continuing basis if they are to stand a chance of survival in the international corridors of power.[699]

The following chapter now hrings this thesis to the point where it is noted that having analysed the responses of the various OFCs including Switzerland in Europe and Hong Kong in Asia, and it will also be noted that the relocation of global wealth management is now being diverted from the traditional European regimes to the newly emerging Asian regional financial centre of Singapore.

Chapter 6 examines the legislative and regulatory responses of Singapore to the major supranational directives concerning harmful tax practices, money laundering, confidentiality and exchange of information. This analysis will also draw attention to the comparisons with the Swiss model in terms of secrecy [700] and bank confidentiality.[701] The Wolfsberg Principles are given further attention as Singapore is positioning itself to be another alternative besides Switzerland, in the realm of private banking and global wealth management. The relevance is heavier as the origins of the Wolfsberg Principles are that of private banks who wish to have regulations in place to combat money laundering and tax evasion in line with the directives of the OECD and the FATF.

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[699] Ibid.

[700] Swiss Civil Code, Art 398. The agent is obligated, in general, to use the same care as the employee under an employment contract. Affirmed by the Swiss Federal Tribunal in 1937: 63 Arrêts du Tribunal Fédéral Swiss II 242, 16 September 1937 .

[701] Federal Law Relating to Banks and Saving Banks, Recueil Systématique du Droit Fédéral (amended 1934, 1991), 952 (the Swiss Banking Law), Art 47 (Official Collection of Federal Laws and Regulations 1971 at 808).

Chapter 6: Singapore as a Compliant Jurisdiction

6.1 Introduction

Switzerland currently manages approximately US$2.2 trillion of offshore assets[702] due to its historic stable financial and political environmental, which translates into a safe haven for investing money. Further, it also has long-standing expertise in multi-currency investments, with pro-investor banking secrecy laws, and discrete and well regarded personalised services. To many, Switzerland is a politically-neutral, tax-efficient and trustworthy financial centre.

But Switzerland's position as a offshore financial centre is set to weaken with the possibility of significant fund outflows to Asia and elsewhere. Switzerland will soon lose some of its tax competitiveness which is one of the main benefits for its past success in attracting offshore funds.

In June 2003, under pressure from G8 countries, Switzerland has agreed to repatriate income taxes on accounts held by citizens of the European Union, due to start in July 2005, but which may be delayed further until 2006. The tax rate will start at 15 percent and increase to 35 percent by 2011.[703]

Other EU's countries have also adopted or will adopt the EU's Savings Tax Directive, which requires financial institutions to report financial information on their non-

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[702] Laura Cohn and David Fairlamb, *Singapore And Its Growing Effect On Private Banking. Swiss Banks: Paradise Lost* (2003) eBrain Hosting <http://www.ebrainhosting.biz/english/news/news-Singapore_private.html> at 29 February 2004.

[703] SwissInfo, *EU Tax Deal Leaves Swiss Banking Secrecy Intact* (2003) <http://www.swissinfo.org/sen/Swissinfo.html?siteSect=105&sid=3900237> at 24 October 2003.

resident investors. This means that account holders will have to pay taxes on their investment income to their respective governments, which previously was not done.

In light of these developments, the analysis of this chapter will demonstrate how it is likely that the wealthy may decide to place their wealth away from Switzerland, and the other wealth management centres in Europe. The wealth management industry in Asia, especially Singapore, in response to all the supranational directives, is poised to benefit from these recent developments in Europe over and above the growing amount of indigenous wealth in Asia.

Similar to Switzerland, Singapore has strong fundamentals. Firstly, it has a good record of creating and maintaining sound economic policies and is politically stable. Its financial industry is regulated to the highest international standards. Secondly, it is the world's fourth largest foreign exchange centre with a large presence of public equity, private equity, fixed income and hedge fund managers.[704]

Thirdly, Singapore has an extremely favourable regulatory environment for the placement and investment of offshore funds. Its tax system allows offshore funds to compound tax free, as no taxes on interest and capital gains are imposed on non-residents. There are also no barriers to the entry and repatriation of funds.

Fourthly, the Singapore government plays an active role at increasing transparency and minimising bureaucratic practices. It also has stringent client confidentiality laws, comparable to those of Switzerland. With these advantageous factors in place,

[704] Francis Koh, Lee Choon Li and Parthsarthi Jindai, 'Singapore as an Emerging Hub for Wealth Management' (2003) November *Pulses, A monthly publication of Singapore Exchange Limited* 10.

Singapore has positioned itself to being a benefiting party to the movement of offshore funds out of Europe.[705]

It can be seen that Singapore's development as an international financial centre began in the late 1960s. Since then, Singapore has implemented an economic blueprint that has encouraged inward investments of multinational corporations to Singapore. The inflows of foreign direct investment from the UK, US and Japan provided an impetus to the development of the financial sector. By the 1980s, many of the world's leading financial institutions had set up operations in Singapore.[706]

Over the years, its sound economic and financial fundamentals, conducive regulatory and business environment, strategic location, skilled and educated workforce, excellent telecommunications and infrastructure, and high living standards have attracted many reputable international financial institutions to set up operations in Singapore. On the back of growing prosperity in the region and support from the authorities, Singapore has developed into a regional, and subsequently, global foreign exchange trading centre. Today, only London, New York and Tokyo record higher foreign exchange trading volumes than Singapore. The Singapore International Monetary Exchange (SIMEX)[707], the first derivative exchange in Asia, also grew in stature to become a key Asian financial hub in the global chain of leading future markets. Today, financial services account for 11% of Singapore's GDP.[708]

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[705] Ibid.

[706] Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, *Positioning Singapore as a Pre-eminent Financial Centre in Asia* (2002) Channel News Asia <http://www.channelnewsasia.com> at 9 November 2003.

[707] SIMEX and the Stock Exchange of Singapore (SES) have since merged to become the Singapore Exchange (SGX).

[708] Monetary Authority of Singapore <http://www.mas.gov.sg> at 3 November 2003.

There is a large and diversified group of local and foreign financial institutions, numbering about 700, located in Singapore and offering a wide range of financial products and services. These include trade financing, foreign exchange, derivatives products, capital market activities, loan syndication, underwriting, mergers and acquisitions, asset management, securities trading, financial advisory services, and specialised insurance services. The presence of these leading institutions has contributed to the vibrancy and sophistication of Singapore's financial industry.[709]

Fund management companies in Singapore have expanded in terms of size, regional responsibility and capabilities, with 70% of funds under management sourced from the US, Europe and Asia.[710]

Singapore's asset management industry has managed good growth since 1994. Assets under management (AUM) by Singapore-based financial institutions have grown steadily from S$66 billion in 1994 prior to the implementation of developmental measures to S$307 billion as at end of 2001. Singapore has evolved into a major regional asset management centre, hosting more than 200 asset management outfits, which employed 1114 professionals as at end of 2001. Almost three-quarters of discretionary AUM is sourced from overseas.[711]

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[709] Ibid.
[710] Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 706. The major Swiss and European private banks such as USB, Credit Suisse and ABN-Amro all have regional headquarters in Singapore.
[711] Ibid.

Private banking is a discrete industry, but a survey of Asia / Pacific Private Banking and Wealth Management by Pricewaterhouse Coopers released in July 2003 revealed that AUM grew 11 per cent region-wide and 12 per cent in Singapore in 2002.[712]

Singapore's developmental objective is to become a centre for (a) managing the Asian investment portfolios of both Asian and Western clients and (b) managing global investments of clients in Asia. Today, 43% of assets managed in Singapore were sourced from Europe and North America, with 30% of assets invested in Singapore, 9% in Japan and 18% in the rest of the Asia Pacific. However, Singapore remains a predominantly Asian mandate centre, with funds mostly invested in Asia, although the amount of investment in the US and Europe carried out from Singapore has increased in recent years.[713]

The offshore-banking business is under pressure around the world. But as offshore participants (particularly the many institutions with businesses in Switzerland) review their business in light of unfavourable regulatory charges, they will find they have several options that will help them remain competitive.

One of the options is to grow beyond their home market. They can do so by building onshore presences in selected locations or by intensifying their efforts to grow in other key offshore locations such as Singapore. Thus there is the increasing need for

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[712] Vikram Khanna, 'Tougher Times for Private Banking' *Business Times* (Singapore) 5 November 2003.

[713] Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 711.

Singapore to cement in the minds of the offshore players, her position as the next best alternative.[714]

After examining the OFCs legislation and responses to the directives of the supranational organisation in respect to (a) harmful tax practices, (b) money laundering, (c) confidentiality and (d) exchange of information, the following analysis of Singapore's legal and regulatory systems will demonstrate how it has responded to these issues and why in totality this regional financial centre will continue to develop ahead of the other OFCs, and in doing so, will become the new jurisdiction of choice for those seeking to use an OFC for future wealth management.

6.2 Legal Framework – Legislation Enacted by the Parliament of Singapore

Singapore, which is a republic, was a colony of the United Kingdom and briefly part of the Federation of Malaya. She has a unicameral parliament and a government patterned after the Westminster model, in which Parliament enacts laws and confers executive powers thereunder upon ministers,[715] who form a cabinet headed by the Prime Minister.

The President is the constitutional Head of State. Although the President does not have executive powers, his assent is required before any legislation can have the force of law.[716] Local legislation comprises acts passed by Parliament and assented to by

[714] The Boston Consulting Group, above n 398.
[715] The Ministers usually are empowered under their respective Acts to promulgate such subsidiary legislation as in necessary for the implementation of Acts.
[716] Article 58 of the Singapore Constitution provides that "the power of Legislature to make laws shall be exercised by Bills passed by Parliament and assented to by the President."

the President, and subsidiary legislation promulgated thereunder by ministers exercising their delegated authority.

Singapore's judicial system comprises three tiers of courts:

(i) The Subordinate Courts, consisting of the Coroners' Courts, the Juvenile Courts, the Magistrates' Courts, and the Small Claims Tribunal;

(ii) The Supreme Court, which comprises the High Court, the Court of Appeal, and the Criminal Court of Appeal, and

(iii) The Judicial Committee of the Privy Council, which traditionally has been the highest court of appeal for Britain's former colonies.

6.3 English Common Law and Statutes

The reception of English Common law in Singapore was effected by the Letters Patent issued on November 27, 1826, more commonly referred to as the Second Charter of Justice, which established the Court of Judicature of Prince of Wales Island, Singapore, and Malacca and required the court "to give and pass Judgement and Sentence according to Justice and Right". This phrase traditionally has been interpreted to mean that the English law and equity, as it stood in England in 1826, was part of the law of the Straits Settlements.[717]

As a result of the foregoing, matters which have not been legislated upon by the Singapore Parliament, are governed by English Common Law, embodied in decided

[717] *Regina v. Williams* (1858) 3 Kyshe 16; *Fatimah v. Logan* (1871) Kyshe 225.

cases of the English courts, with such adaptation as are required by local circumstances.[718]

The Common Law enjoys continuous reception in Singapore as 'the Common Law was traditionally conceived of as having existed from time immemorial and was merely declared by the judges from time to time …'.[719] According to this interpretation of the Common Law, the courts in England deciding a case today simply would be declaring the law as it has always been (and, hence, as it was at the date of the Second Charter of Justice), and applying it to the facts before them.

6.4 Harmful Tax Practices: Singapore Tax System

Taxation is a cost both to the individual and the business. The burden of personal income tax on individuals whether borne by the individual himself, his employer or partly by both is a consideration of great importance. In Singapore, as in any other country, the total burden of income tax, whether company or personal, is determined by two factors – first, the amount of income that is subject to tax and secondly, the rates of tax that apply to such income.[720]

Under the current Singapore tax system, interest income derived by a Singapore resident individual from investing in Singapore interest-bearing instruments will be

[718] See Walter Woon (ed), *The Singapore Legal System* (1989), 119, where he states modifications to suit the customs, manners, usages and religions of the native inhabitants." An example, he cites the relaxation, in colonial days, of the common law concept of monogamous marriage in the case of the Chinese.

[719] See G W Bartholomew, 'English Law in Partibus Orientalium' in A J Harding (ed), *The Common Law in Singapore and Malaysia* (1986) 15.

[720] Angela Tan, Jennifer Sng Gek Neo and Tan How Teck, *Singapore Master Tax Guide 2002* (21st ed, 2002) 564.

taxed at the individual's highest applicable marginal tax rate. As unremitted interest income from offshore investments is not subject to Singapore tax, individuals are motivated to move savings offshore and not repatriate these funds.

The repatriation of offshore Singapore wealth will provide a substantial boost to the local wealth management industry. This will help to anchor financial institutions in Singapore. To encourage firms to source for more foreign funds for management in Singapore, there were proposals that tax exemptions be granted for: (a) domestic source investment income and foreign source income remitted to Singapore, and (b) management fee income earned by fund managers from managing funds sourced overseas. These two proposals were accepted and announced in Singapore Budget 2004.[721]

Tax friendly conditions are essential to creating an attractive business environment. While tax is only one factor in deciding where to locate business operations, it is often a significant factor for consideration, especially with increasing labour and capital mobility.

It has been recommended that to maintain Singapore's domestic competitiveness as a financial centre, there should be a general shift in resources from the public sector to the private sector through reduced tax collections. The use of targeted tax incentives should also be maintained, as this would give Singapore an edge in attracting expertise and higher-value added financial services.[722]

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[721] Economic Review Committee, Budget Speech 2004 (2004) Budget 2004 <http://www.budget2004.gov.sg> at 28 April 2004.

[722] Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 713.

In 2002, Singapore's imputation system of taxation was abolished and replaced by the one tier income tax system. Under the one tier system, foreign income will only be taxed in Singapore in so far the income is remitted, or is deemed remitted in to Singapore. The Singapore Income Tax Act contains a number of provisions on the basis of which income will be deemed to have been remitted into Singapore. For instance, repayment of debt out of income kept offshore, triggers a deeming provision resulting in the foreign income becoming taxable in Singapore. The initial conclusion was that the declaration of an interim dividend should not trigger mentioned deeming provision as the payment of an interim dividend could not be regarded as a repayment of debt.

The Inland Revenue Authority of Singapore (IRAS) has published a Supplementary Circular on the one-tier corporate tax system. This Circular confirms that foreign sourçed income kept offshore out of which dividends are distributed, will not be considered to have been remitted into Singapore. Final dividends too can therefore be distributed out of such income.

Singapore has become a very interesting location for distributing foreign income to foreign shareholders. It is important to note, however, that if the Singapore company would wish to claim the treaty benefits in respect of such foreign income, Singapore tax treaties generally include a provision which stipulates that treaty benefits can only be claimed in respect of remitted forcign income.

The following favourable changes were made to the Singapore tax law.

- first of all, the corporate tax rate was reduced from 24.5% to 22%[723] and estate duty for movable assets situated in Singapore for non-domiciled individuals is exempted;
- more importantly, section 44 of the Income Tax Act[724] was replaced by a one-tier corporate tax system – tax collected from corporate profits is now final; dividends paid out of corporate profits will be exempt from tax in the hands of the shareholders and companies will no longer be required to frank their dividends under the present dividend imputation system.

Thus a company with offshore income or capital gains will be able to pay dividends out of its untaxed income or gains without having to deduct tax from the dividends declared. It is no longer necessary for trust structures to use Singapore non-resident companies. However, offshore income brought into the country by a Singapore company will still be subject to tax in Singapore as income received locally.

The Companies Act[725] has also been relaxed. Private exempt companies with an annual turnover of less than S$5 million will be exempted from submitting audited accounts. Private companies are allowed to have a sole shareholder and director; the director must be resident in Singapore.

Like Hong Kong, Singapore has never been blacklisted in the major international reports, including those of the OECD and FATF. With the debates of EU savings tax directives and other compliance issues faced by European counterparts, these two

[723] The corporate tax rate will be cut from 22% to 20% with effect from Year of Assessment (YA) 2005. *Income Tax Act (Chapter 134) 1948* (Singapore) s40.
[724] *Income Tax Act (Chapter 134)* 1948 (Singapore) s44.
[725] Companies Act (Chapter 50) 1967 (Singapore) s205C.

financial centres in Asia should be able to benefit in the longer term.[726] Although as noted previously, Hong Kong has a perceived sovereign risk attached to it, as a result of the recent ruling of the Standing Committee of China's National People's Congress (NPC) on 6 April 2004 that it has a veto over how Hong Kong's leader and legislature should be elected. It said that while Hong Kong can change its election laws from 2007, it first must obtain approval from Beijing. The decision rests on an interpretation of territory's mini-constitution, the Basic Law. It effectively means that China can veto any moves to give Hong Kong more democracy, such as direct elections for its chief executive.[727]

On 21 May 2003, the IRAS released a Circular which contained further details on the "Tax exemption for foreign-sourced dividends, foreign branch profits and foreign-sourced service income.", as proposed in the Budget 2003. The tax exemption applies to the specified foreign sourced income received in Singapore on or after 1 June 2003; the income does not need to be earned on or after mentioned date. The exemption is, where applicable, available to Singapore based incorporations and individuals resident in Singapore. The conditions for qualifying are as follows. In the year the income is received in Singapore, the headline tax rate of the foreign jurisdiction from which the income is received is at least 15%. Furthermore, the income has been subjected to tax in the foreign jurisdiction from which these were received.[728]

6.4.1 Tax Evasion

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[726] Fong, above n 696.
[727] BBC News, China Veto Angers HK Democrats (2004) <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/3602921.stm> at 10 May 2004.
[728] Loyens & Loeff, Asia Newsletter, Summer 2003.

The Association of Banks in Singapore (ABS) issued its first Guidelines: "Prevention of the Misuse of the Singapore Banking System for Drug Trafficking and Money Laundering Purposes" in 1990. In 1994, after the passing of The Drug Trafficking (Confiscation of Benefits) Act (DTA), ABS revised the 1990 Guidelines. The scope of the anti-money laundering law under the DTA was significantly enlarged under The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (SCA)[729], which replaced the DTA. [730]

One of the most significant changes under the SCA is the extension of the Act to criminalise non drug-related criminal offences. These offences are called 'Serious Offences' and 'Foreign Serious Offences' (collectively termed 'Criminal Conduct'). Thus the SCA has now criminalised all Drug Trafficking Offences, Foreign Drug Offences[731], Serious Crimes and Foreign Serious Crimes.[732]

There are 182 Serious Crimes listed in Schedule 2 of the SCA.[733] These criminal offences are punishable under ten penal statutes[734] which include the Penal Code, Kidnapping Act, Prevention of Corruption Act and Women's Charter.

[729] Corruption, Drug Trafficking And Other Serious Crimes (Confiscation Of Benefits) Act (Chapter 65a) 1993 (Singapore)

[730] The Association of Banks in Singapore, *Guidelines on Prevention of Money Laundering* (2001) <www.abs.org.sg> at 15 November 2003.

[731] 'Foreign Drug Trafficking Offence' means a drug-trafficking offence punishable under a corresponding law. (s. 2).

[732] 'Foreign Serious Offence' means an offence committed outside Singapore which constitutes a Serious Offence under the SCA (s. 2).

[733] See Appendix L for the full list of 182 Serious Crimes.

[734] The ten statues specified in Schedule 2 are: (i) SCA itself; (ii) Children and Young Persons Act; (iii) Corrosive and Explosive Substances and Offensive Weapons Act; (iv) Hijacking of Aircraft and Protection of Aircraft and International Airports Act; (v) Kidnapping Act; (vi) Penal Code; (vii) Prevention of Corruption Act; (viii) Termination of Pregnancy Act; (ix) Vandalism Act; and (x) Women's Charter.

While the enlargement of the scope of moncy laundering law under the SCA is very inclusive, one could say that the SCA has not gone far enough because it fails to criminalise some of the other serious crimes. For instance, tax evasion (which includes duty evasion, exchange control and capital control evasion) is omitted from Schedule 2 even though these are common activities in ASEAN. Since such criminal activities are not included in the 182 Serious Offences, they do not constitute the offence of money laundering under the SCA.

It is interesting to note that out of the 182 Serious Crimes in the Schedule, many of these criminal activities do not generate financial gains or proceeds. For instance, homicidal cases (Offences 54-58), causing hurt (Offences 63-74), wrongful confinement (Offences 81-82) are hardly associated with money laundering. Therefore, it could be argued that the SCA would be more effective if it had included more of the financial-related offences (such as tax evasion, smuggling, corporate offences) in places of these non-financial serious crimes. [735]

Singapore has 46 comprehensive tax treaties that are in force. Singapore has also entered into limited tax treaties with 6 other countries (Bahrain, Chile, Oman, Saudi Arabia, United Arab Emirates, US) for reciprocal tax exemption on income derived from international shipping and/or air services.[736]

In any tax planning, an extremely important consideration is whether the anti-avoidance provisions will apply. The general anti-avoidance provision in the Income

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[735] Tan Sin Liang, 'Singapore: New Money-Laundering Law under the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act', (2000) 3 *Journal of Money Laundering Control* 260-1.

[736] Ministry of Finance, Singapore <http://www.mof.gov.sg> at 3 November 2003.

Tax Act (Section 33) confers upon the tax authorities wide powers to disregard or vary the arrangement, and to make the appropriate adjustments. This provision, however, does not apply to any arrangement carried out for bona fide commercial reasons and which does not have as one of its main purposes the avoidance or reduction of tax.[737]

6.4.2 Conclusion

In conclusion, from the above analysis, it needs to be restated that Singapore was never listed in the 1998 OECD report entitled *Harmful Tax Competition: An Emerging Global Issue.*[738]

In Singapore, income is taxed on a territorial basis. Section 10(1) of the Singapore Income Tax Act ("SITA"), Cap 134 provides:

> Income tax shall ... be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore.

Only income which accrues in or is derived from Singapore will be subject to tax in Singapore. Where the income is accrued in or derived from outside Singapore, it has to be remitted to Singapore in order to be subject to tax in Singapore. Capital gains are generally not subject to tax in Singapore.

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737 Ibid.
738 Organisation for Economic Co-operation and Development, above n 505.

6.5 Money Laundering – Singapore's Legislation

The IMF released a report assessing Singapore's financial system stability and revealed the following standards and codes which Singapore had in place in its banking and finance system, a summary of which follows:[739]

- Basel Core Principles (BCP) for Effective Banking Supervision: Overall, the MAS has established a sound prudential and regulatory framework for effective supervision of its commercial banking sector and has achieved a high level of observance of the BCP. There are no weaknesses that raise financial stability concern.

- International Association of Insurance Supervisors (IAIS) Insurance Core Principles: Singapore has a high level of observance of the IAIS principles. Significant initiatives are currently being developed in consultation with the industry – particularly the overhaul of the capital standards to a more comprehensive and risk-based approach with new rules giving specific attention to corporate governance and internal controls. The implementation and enforcement of these initiatives, which are well advanced, will further improve observance.

- International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation: Singapore has achieved a high degree of compliance with the IOSCO principles. The framework for the oversight and

[739] International Monetary Fund, *Singapore: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, Payment and Settlement Systems, Monetary and Financial Policy Transparency, and Anti-Money Laundering* (2004 IMF)

regulation of securities markets, intermediaries, issuers, and collective investment schemes is well developed, sophisticated, and meets international standards. The MAS should require periodic reporting of net asset values and ensure that a Collective Investment Scheme (CIS) operator has systems in place to calculate net asset values correctly.

- Committee on Payment and Settlement System (CPSS) Core Principles for Systemically Important Payment Systems (CPSIPS): Singapore has a highly developed payment system. The MEPS – a systemically important payment system – is a reliable and robust real-time gross settlement system and exhibits significant observance of CPSIPS principles. The settlement risk of foreign exchange transactions in Singapore dollars has been further reduced by the inclusion of the Singapore dollar in the CLS in September 2003.

- CPSS-IOSCO Recommendations for Securities Settlement Systems: Neither the MAS Electronic Payment System-Singapore Government Securities (MEPS-SGS) – which clears and settles SGS on an real-time gross settlement basis—nor the Central Depository Private Limited (CDP) – which clears and settles equities and private debt securities – is subject to major vulnerabilities. While the MAS oversight objectives with respect to securities settlement systems are set out in various documents, it is recommended that the MAS publish a document on the oversight framework for securities settlement systems and its approach to its administration.

- Transparency in Monetary and Financial Policies: The transparency of monetary policy framework has improved substantially in recent years. Given the exchange rate regime-based monetary policy, however, the authorities remain cautious about publishing certain information on the monetary policy framework and monetary operations. For example, neither the weights used in the trade-weighted exchange rate index nor the precise limits of the band are disclosed. Similarly, the extent of MAS interventions in the foreign exchange market is not disclosed on a predetermined or timely schedule. Greater disclosure in these areas could be considered to the extent it does not compromise the monetary policy regime. The MAS has made steady progress toward improving transparency in financial policies in recent years and now meets many of the elements of the Transparency Code. The MAS could further improve transparency through providing more detailed information on recent developments in the financial sector and its supervisory activities in its regular publications, including regarding local financial institutions' overseas operations.

- Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT): Singapore now has in place a sound and comprehensive legal, institutional, and policy and supervisory framework for AML/CFT and the authorities have demonstrated a strong commitment to its effective implementation. Though some steps have been taken with the enactment of a domestic mutual legal assistance law and ongoing negotiations for several bilateral treaties, the effectiveness of cross-border mutual legal assistance needs to be improved as it relates to compulsory assistance at international request, including the provision of bank records. The Palermo Convention is signed but yet to be ratified. Some aspects of best practice for customer due diligence need to be specified more clearly and in greater detail, though implementation was observed in individual institutions.

Although the regulatory systems and supervisory practices exhibit a high degree of observance of international standards and codes, the IMF made some specific recommendations to further enhance the risk-based regulatory and supervisory framework, strengthen the accountability and independence on the MAS, and improve monetary and financial policy transparency.[740]

6.5.1 Singapore's Guidelines on Prevention of Money Laundering

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (SCA)[741] itself was further amended by the Mutual Assistance in Criminal Matters Act (MACMA), passed by parliament on 22 February 2000. Owing to the changes in the anti-money laundering law in Singapore and with the benefit of the six years of experience in implementing the 1994 Guidelines, the ABS revised the 1994 Guidelines to keep the banks abreast with the law and to provide a more comprehensive guideline to help banks in Singapore combat money laundering more effectively.

ABS recommends these Guidelines for the preservation, nationally and internationally, of the good name of the banking community in Singapore. Further ABS recognises the need to prevent or minimise the banking system from being used for the

[740] Ibid 36.
[741] See Appendix L for the 182 Serious Offences listed under the SCA.

furtherance of criminal purposes by means of money laundering activities, taking into consideration:

(i) The latest "Guidelines on prevention of Money Laundering" issued by the Monetary Authority of Singapore (MAS 626);
(ii) The Statement of Principles proposed by the Basle Committee on Banking Regulations and Supervisory Practices in December 1988;
(iii) The Financial Action Task Force's 40 Recommendation;
(iv) The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act; and
(v) The Mutual Assistance in Criminal Matters Act 2000

These Guidelines apply to all banks and their subsidiaries in the banking sector operating in Singapore. They also apply to the foreign branches and subsidiaries of Singapore-incorporated banks. Where the laws of the foreign jurisdictions conflict with these Guidelines, the foreign branches and subsidiaries must comply with the former; provided the head office of the Singapore-incorporated bank is informed of the departure from these Guidelines. These Guidelines constitute the best practices for all banks operating in Singapore in matters relating to the prevention of money laundering in Singapore.[742] Some of the Guideline are mentioned here to highlight the country's stand with the OECD and the FATF.

6.5.2 Guideline 4 – Know Your Customer (KYC)

[742] The Association of Banks in Singapore, above n 730.

Under Guideline 4, Singapore's policy is in line with the FATF's recommendations in combating money laundering and Wolfsberg Principles as analysed in Chapter 2.[743]

All banks are to know their customers. This means that each bank must be able to establish the identity and a basic background of their customers. Each bank must establish its own KYC programme, tailored to suit the size, nature and complexity of its operation and business in Singapore.

There should be an explicit policy in every bank not to conduct any significant business with a customer (prospective or otherwise) who fails or refuses to provide basic information under this Guideline 4 necessary to establish the customer's true identity or the background of the transaction the bank is asked to carry out. In the event a bank decides not to carry out the transaction requested by the customer on the ground that it is a suspicious transaction, the bank must nevertheless consider, depending on the circumstances of the case, its legal obligation to report under section 39(1) of the SCA.

6.5.3 Guideline 6 – Suspicious Transaction Reporting (STR)

Each bank is to clarify the economic background and purpose of transactions that are inconsistent with the customer's transaction profile or where the economic purpose or the legality of the transactions is not immediately evident. In determining whether it is a suspicious transaction, a bank must consider the totality of the transactions put together and not each transaction (which, on its own, may be perfectly legitimate) in

[743] Organisation for Economic Co-operation and Development, above n 738.

isolation. A transaction or a series of transactions shall be considered as "suspicious' if the transaction / transactions in question is / are inconsistent with the customer's known transaction profile or does not make economic sense.[744]

According to section 39(1) of the SCA, a bank employee has a legal duty to make a suspicious transaction report (STR) if he or she knows, or has reasonable grounds to suspect, that the transaction in question involves drug trafficking or criminal conduct (i.e. money laundering).

All banks are to report suspicious transactions to the Suspicious Transaction Reporting Office (STRO), Commercial Affairs Department (CAD), and each copy of each STR is to be forwarded to the Monetary Authority of Singapore (MAS). A bank will then fully investigate and evaluate, according to its internal procedures, an apparent potentially suspicious transaction and satisfy itself that it is a suspicious transaction before making a STR. In investigating into an apparent suspicious transaction, a bank is to give adequate opportunity to the customer (or prospective customer) to explain the concerns raised by the bank. In carrying out its due diligence, a bank must exercise due care not to unwittingly commit a tipping-off offence in contravention of section 50 of the SCA. Notwithstanding that, after its own investigation, a bank may decide not to establish a banking relationship with a prospective customer or to terminate its existing banking relationship with the customer, it should nevertheless consider its legal obligation to report under section 39(1) of the SCA.[745]

[744] See Appendix M for the examples of suspicious transactions as listed in MAS 626.
[745] The Association of Banks in Singapore, above n 742.

A bank owes a duty of confidentiality to a customer not to disclose confidential information relating to his account to an unauthorised third party. To facilitate the making of STRs, the law, pursuant to the SCA, allows a bank to disclose confidential information relating to a customer's account (used to conduct a suspicious transaction) to an Authorised Officer without contravening its duty of confidentiality and without being liable to the customer for damages suffered arising from the disclosure.[746]

Prior to the amendment under the SCA, it was not legally mandatory for a person to report a suspicious transaction. However, under the SCA, suspicious transactions reporting (STR) is now mandatory. The legislature achieved this by substituting the discretionary language ('may') with a mandatory language ('shall') in the new s. 38(1) of the SCA.

An area which is likely to trouble compliance bankers is the reporting of suspicious transactions which may not be related to a money laundering offence as defined by SCA. To be sure, the SCA provides comprehensive statutory protection under s. 41 and s. 41A for a whistle blower against civil and criminal proceedings. However, these statutory protections can only be invoked if the information disclosed involves drug trafficking or criminal conduct. It will always be difficult (sometimes impossible) to be sure of the actual source of the criminal proceeds from the underlying suspicious transactions reported. This can pose real problems in practice for a banker.

For example, one bank was in a dilemma in deciding whether to report a customer from a neighbouring country which deposited a total sum of SGD3.5 million (partly in

[746] Ibid.

cash, the remainder in third-party cheques issued by a money changer) with no satisfactory explanation. There was no doubt that this was a suspicious transaction, but the source of these funds was in doubt. There was a very strong suspicion that the funds were criminal proceeds from either corruption or capital control evasion (or both); but it was not definite. If it was corruption, the bank would be safe in reporting; however if it was solely capital control evasion, it would be unsafe to report the transaction. It is argued that a banker, in such circumstances, may nevertheless report to an Authorised Officer with impunity if he has reasonable grounds to believe that the funds are proceeds, partially or directly or indirectly, derived from corruption activities (a Criminal Conduct under s. 38(1)). This view is further fortified by subsections 41(3) and 41A(3), which merely require the disclosure of a bona fide 'suspicion' or 'belief'.[747]

6.5.4 Guideline 8 – Training

Banks are prime targets for money laundering activities. Therefore, it has been imperative that banks train their employees, at various levels, to detect money laundering activities. This has assisted banks in Singapore to reduce (if not, to prevent) the incidences of money laundering activities that may take place in their operations. Training is also important in ensuring a bank's legal compliance with the anti-money laundering laws in Singapore. This will help a bank and its employees to avoid prosecution for money laundering and other related offences. Each bank had to adopt

[747] Tan, above n 735, 261-2.

a training programme suited to its size, nature and the complexity of its business and operation in Singapore.[748]

6.5.5 Characterisation of Terrorism Financing and Money Laundering in Singapore

In most jurisdictions, terrorism financing would be characterised as a money laundering offences. Where does terrorism financing fit into the anti-money laundering legal regime in Singapore? Is terrorism financing a money laundering offence in Singapore? The answer is negative for 2 reasons. First, "terrorism" or "terrorist act" is not included in the predicated offences under SCA. Secondly, the anti-money laundering regime in the SCA does not envisage a "reverse money laundering" activity. An activity criminalised as a "money laundering" offence when a person attempts to conceal the proceeds from some criminal activities (i.e. "dirty money"). In Singapore it is, strictly speaking, not a money laundering offence, if the proceeds from legitimate businesses are used to commit a crime because there is no "proceeds from" the predicated money laundering offence (i.e. not "dirty money"). [749]

This does not mean that there is no criminal offence committed; the person carrying out such an activity can be charged under other criminal statutes (e.g. Penal Code). For example, in the case of hijacking, it is a money laundering offence under SCA if a bank knowingly wire transfers proceeds from hijacking for its customer. However, it is not a money laundering offence under the SCA if the same bank were to wire transfer funds from a legitimate business (e.g. public donations to a religious charity

[748] The Association of Banks in Singapore, above n 746.
[749] Tan Sin Liang, 'The Threat of Terrorism & Singapore's Legislative Response to Terrorism Financing' (2003).

organisation) to a customer who used these funds to commit a hijacking offence because the source of these funds is "clean". This is "reverse money laundering". Terrorism is a classic form of "reverse money laundering". The SCA clearly does not govern "reverse money laundering" activities but such activities relating to terrorism and terrorism financing are directly "caught" under the anti-terrorism laws in Singapore.[750]

6.5.6 Compliance Challenges for Financial Institutions against Terrorism Financing

The challenges facing a bank and a professional adviser or compliance officer in combating terrorism financing are numerous. First they must ensure that the customer is not a "Terrorist"[751] or a "Terrorist Entity"[752] and the account or transaction is not related to "Terrorist Property"[753] or to facilitate a "Terrorist Act"[754]. The list of "Terrorist" and "Terrorist Entities" are named in the Schedules of both the UN Regulations and the MAS Regulations and they are constantly growing. Many of the individual terrorists have numerous aliases and several birthdates. This is a compliance officer's worse nightmare. It is neither practical nor administratively viable to monitor this ever growing list of terrorists manually. The only viable option is to use sophisticated computer software to track these terrorists. Besides the multiplicity of names and birthdates of individual Terrorists, compliance officers must

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[750] Ibid.
[751] A "Terrorist" is defined in Reg. 4(1), UN Regulations; Reg. 4(1) MAS Regulations and section 2, Terrorism Act to mean a person who commits, participates or facilitates a "Terrorist Act".
[752] A "Terrorist Entity" is defined in s. 2, Terrorism Act to mean an entity owned or controlled by any Terrorist or a group of Terrorists.
[753] This term is used to refer to a property owner or controlled by or on behalf of any Terrorist or Terrorist Entity.
[754] There is a long definition of "Terrorist Act" (with the same meaning) in Reg. 4(1), UN Regulations; Reg. 4(1) MAS Regulations and s. 4(2), Terrorism Act

be watchful for Terrorist Entities with unsuspecting commercial names such as "Al-Nur Honey Press Shop" (Yemen), "Barakat Wire Transfer", "Benevolence International Fund" and "Global Relief Foundation".[755]

Secondly, the next challenge is whistle-blowing. It is mandatory for a Singapore citizen / resident or a financial institution who / which has (a) possession, custody or control of a Terrorist Property or (b) information about any transaction relating to a Terrorist Property to report immediately to the Police Commissioner (for the public at large) or to MAS (for banks).[756] But what protection does the law provide for whistle-blowers? The Terrorism Act[757] and the Banking Act[758] expressly immunise a whistle-blower (pursuant to the Terrorism Act and the MAS Regulations, respectively) against any criminal and civil proceedings. The UN Act[759] also immunises a whistle blower (pursuant to the UN Regulations) against civil proceedings but is unclear against criminal proceedings.[760]

5.5.7 Supervisory Framework

In line with Singapore's goal to become a premier global financial centre, the MAS has instituted a new supervisory framework based on the key tenets of:-

- Maintaining High Prudential and Supervisory Standards

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755 Tan, above n 749.
756 Reg. 10, UN Regulations, Reg. 9, MAS Regulations and s. 8, Terrorism Act.
757 Section 9(5) and section 10(3), Terrorism Act.
758 There is no safe harbour provision for whistle blowing in the MAS Regulations. It is, however, found in s. 27A(3) of the Banking Act.
759 Like the MAS Regulations, there is no express statutory protection provision in the UN Regulations. To invoke the statutory protection, one has to invoke s.3(1) of the UN Act.
760 Tan Sin Liang, above n 755.

MAS continues to oversee the financial sector professionally, vigilantly and proactively. The maintenance of high standards of integrity and sound financial management does not contradict the aim to create a more dynamic, innovative and vibrant financial sector. A sound financial system serves as the foundation on which the liberalisation of the financial sector can take place.

- Shifting the Emphasis from Regulation to Supervision

  MAS has shifted its emphasis in overseeing the financial sector from regulation to supervision. The supervisor's primary responsibility is to protect the stability of, and maintain confidence in, the financial system. MAS will shift from 'one-size-fits-all' regulation towards a greater emphasis on supervision, which entails monitoring and examining institutions for compliance with laws and guidelines, and assessing asset quality and the adequacy of risk management systems. This enables the MAS to provide stronger institutions the flexibility to develop and innovate, while maintaining stricter controls on weaker ones.

- Implementing a Risk-Focused Approach to Bank Supervision

  MAS has adopted a risk-focused, top-down approach to bank supervision, moving away from the traditional, bottom-up method. Rapid technological advancements, increased linkages between institutions and financial markets, and the consequent growth in complexity of banks' activities, have necessitated a more holistic and risk-focused supervisory approach. The approach will enable the allocation of limited supervisory resources to major risk areas and improve the effectiveness and efficiency of the examination process.

, A Risk-Based Examination Approach for Banks

MAS adopts a risk focused approach to bank examination, which focuses on the institution's management quality and processes, and its risk management and control systems. This new approach is better suited to cope with the growing complexity of banks' activities and organisational structures, increased linkages with non-bank financial institutions and institutions abroad, and technological advancements.

MAS' examination procedures focus on a top-down, risk focused approach as compared to a bottom-up, micro approach. Emphasis is placed on the process by which a bank's management itself addresses its risks, instead of reviewing the books for control deficiencies.[761]

[T]he MAS informs banks of upcoming examinations beforehand, allowing pre-consultations with bank management to shorten the actual examination. MAS still conducts surprise examinations when circumstances call for it.

As with the practice of supervisors in other major financial centres, MAS examinations will be more frequent and regular. This enables MAS to distinguish stronger banks, with well-developed systems of internal control, from weaker ones. On-site examination will be supplemented by off-site reviews which involves continuous tracking of institutions, the review of statistical returns and audit reports submitted by banks, and regular meetings with bank management. Full implementation of the new approach will be phased in over the next few years. In changing its approach, the MAS does not inadvertently lower its supervisory

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[761] Monetary Authority of Singapore *Supervisory Framework* <http://www.mas.gov.sg/masmcm/bin/pt1Supervisory_Framework.htm> at 9 November 2003.

standards. High-quality examinations and supervision form the cornerstone of a sound banking system.

- Vesting the Public with the Responsibility to Make Their Own Informed Investment Decisions

  To assist investors in making informed decisions, MAS is providing greater transparency in its regulations, raising disclosure standards and fostering market discipline in the financial industry. MAS also encourages industry groups to develop and enforce standards of good practice.

- Forging a Closer Partnership Between the Government and the Financial Services Industry

  MAS is building a closer partnership with the industry and promoting a more open operating environment. MAS actively seeks industry inputs to adjust its policies to rapidly changing market realities. It will also set up private sector committees to examine issues pertaining to the financial sector. Furthermore, MAS will disseminate policy thinking through associations of the finance industry.

- External/Internal Auditors

  External and internal auditors play an important role in MAS' supervisory process. MAS engages in regular dialogue with the external auditors, and the internal auditors upon the completion of their audits of the Singapore operations to discuss the internal control environment of the institution and issues of mutual concern. Auditors are required to submit audit reports to MAS on the institution's internal controls, and compliance with prudential standards. In addition, external auditors are required to confirm the adequacy of provisions, in conjunction with their statutory audit.[762]

6.5.8 Conclusion

From the above analysis, it was shown how Singapore complies with the recommendations of the FATF (40+8), OECD and in particular, very stringently to the Wolfsberg Principles.

Banks and other financial institutions may be unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity. Criminals and their associates use the financial system to make payments and transfers of funds from one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank-notes through a safe-deposit facility. These activities have been commonly referred to as money-laundering.

In conclusion, it can be seen that the MAS has for the preservation, nationally and internationally, of the good name of the banking community in Singapore and recognising the need to prevent the banking system from being used in furtherance of money laundering activities arising from or in connection with drug trafficking or criminal conduct, has introduced the following:

(i) the provisions of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 84A) (the Act);

[762] Ibid.

(ii) the Financial Action Task Force 40 Recommendations, in particular Recommendations 9 to 20; and

(iii) the Statement of Principles proposed by the Basle Committee on Banking Supervision and Supervising Practices in December 1988; banks in Singapore should comply with these above guidelines.[763]

6.6 Confidentiality: Secrecy and Confidentiality in Singapore

6.6.1 Banking Secrecy in Singapore

In Singapore, the duty of banking confidentiality or secrecy in respect of the client's affairs stems from two sources:

(i) The duty of confidentiality implied by the Common Law by virtue of the banker-customer relationship, and

(ii) A statutory duty imposed by section 47 of the Banking Act (referred to herein as the "section 47 duty" or "the statutory duty").[764]

The Common Law principle is imported as part of the commercial law of England and the Banking Act is part of the legislation enacted by Singapore's Parliament.[765]

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[763] Monetary Authority of Singapore, *Notice to Banks* (2002) <http://www.mas.gov.sg/masmcm/bin/pt1Notice_626__Guidelines_on_Prevention_of_Money_Laundering.htm> at 10 July 2004.

[764] Chapter 19 of the 1985 Revised Edition of the Singapore Statutes

[765] Angeline Yap, 'Singapore' in Dennis Campbell (ed), *International Bank Secrecy* (1992) 577-601.

6.6.2 Contractual Duty of Secrecy

The banker's duty to his customer to keep confidential information regarding the affairs of his customer (such information being referred to hereafter as "confidential information") arises out of the banker and customer relationship and is a term of their contract, implied by the Common Law.[766]

It is referred to herein as "the contractual duty of confidentiality" or the "contractual duty". The customer enforces this contractual right by suing the banker for damages in the event of a breach of this duty. When he does so, the contractual duty of confidentiality, and its scope and application would, in the words of section 5 of the Civil Law Act, be 'questions or issues which arise or which have to be decided in Singapore with respect to the law … of banks and banking'.[767]

Since there is no other provision made by any law having force in Singapore imposing a contractual duty of secrecy, and since the exceptions enumerated in section 5 of the Civil Law Act do not apply, in the words of section 5, "the law with respect to those matters to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England …" subject to modifications required to adapt the Common law to local circumstances.

6.6.3 Duty of Secrecy under Common Law

[766] See *Tournier v. National Provincial & Union Bank of England* [1924] 1 K.B. 461.
[767] Cap. 43 1988 Ed.

Under the Common Law, it is an implied term of the contract between a bank and its customer that the bank will not divulge information to third persons, without the express or implied consent of the customer, either:[768]

(i) The state of the customer's account;

(ii) Any of his transactions with the bank, or

(iii) Any information relating to the customer acquired through the keeping of his account.

These conditions apply unless the bank is compelled to release information:

(i) By order of court;

(ii) Where circumstances give rise to a public duty of disclosure, or

(iii) Where protection of the bank's own interest requires it.[769]

6.6.4 Exceptions at Common Law

Bankes, LJ in *Tournier v. National Provincial and Union Bank,* identified four general exceptions to the duty which have been accepted as an accurate statement of the law:[770]

(i) Where disclosure is under compulsion by law (e.g., where the bank is compelled to obey an order under the Bankers' Books Evidence Act);

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[768] Yap, above n 765.
[769] See Banking Act, section 2.
[770] See the Jack Committee Report, paragraph 5.04.

(ii) Where there is a duty to the public to disclose (e.g., where danger to the state or public duty supersede the duty of the agent to his principle);

(iii) Where the interests of the bank require disclosure (e.g., where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft), and

(iv) Where the disclosure is made by the expense or implied consent of the customer (the familiar instance is where the customer authorises a reference to his banker).[771]

6.6.5 Scope of Duty Not Confined to Information Derived from Account

Both Bankes and Atkin L.J.J. thought that the duty is not confined to information derived from the customer's account.[772] In their opinion, the duty extended to information derived from sources other than the customer's account.

The information in the *Tournier* Case, for example, was derived from another customer's account rather than from the plaintiff's own account. Nevertheless, the Court of Appeal held that the banker's duty did extend to it.[773] Furthermore, Atkin L.J. said:

"I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers – for

771 *Tournier*, p. 473.
772 *Tournier v. National Provincial & Union Bank of England* [1924] 1 K.B. 461.
773 "… the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself…", per Bankes L J, *Tournier*, p. 473, 475.

example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customers."[774]

Information gained during the currency of the account remains confidential unless released under one of the four exceptions. Their Lordships in the *Tournier Case* were of the view that the duty to keep information confidential continues even after the customer ceases to be a customer of the bank. That is, the bank is under a duty to keep the customer's affairs confidential:

(i) During the currency of the banker-customer relationship, and

(ii) After the banker-customer relationship has been terminated.

In the *Tournier* case, Bankes L.J. took the view that danger to the state may supersede the duty of confidentiality.[775]

6.6.6 Amendments to the Banking Act of Singapore – 6th Schedule

Under the Banking (Amendment) Act 2001, a slew of amendments were introduced to the Banking Act, including the banking secrecy provisions. As a result, section 47 (the key provision) together with section 45 and section 46 (previously 46 and 46A) have been re-enacted and a new 6th Schedule introduced (the "Amendments"). [776]

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[774] L J Scrutton, however, felt that the duty did not extend to information derived from the account of another customer. His Lordship said (at p. 482), "It appears to me, therefore, that we cannot imply an obligation to keep secret information about a customer derived not from that customer or his account, but from the account of another customer."

[775] *Tournier*, p.473.

[776] The Banking (Amendment) Bill (No. 21/2001) was passed by parliament on 16 May 2001. The Amendments became effective on 18 July 2001.

The application of some of the banking secrecy rules in the Banking Act under the previous regime has always been a challenge for the banks in Singapore. There have been "gaps" in the rule book and there were "interpretational" problems of some of the statutory banking secrecy provisions. Some banks (particularly foreign banks) have also felt that their operations have, to some extent, been hampered by the rigidity of the banking secrecy laws in sharing certain information required by their head offices, overseas branches and affiliates. This has always been (and still remains) a "sensitive" area.

The Amendments attempt to liberalise the banking secrecy regime further by introducing additional "exceptions" to the general rule of confidentiality. Some of these new "exceptions" represent the "gaps" many bankers have long waited to be filled. The growing list of "exceptions" (both old and new) are now consolidated in the form of the 6th Schedule. Undoubtedly, many of the Amendments (particularly the new exceptions) will be welcomed by the banks. The question is, however, whether they have gone far enough.

6.6.7 Section 47 of the Banking Act – Customer Information

The term "Customer Information" is new. It is defined in section 40A to mean:

(a) "any information relating to, or particular of, an account of a customer of the bank, whether the account is in respect of a loan, investment or any other type of transaction…" or

(b) "deposit information"

The concept of Customer Information is central to the law on banking secrecy in the Banking Act. If a subject matter does not come within the definition of "Customer Information", the issue of banking secrecy does not arise. For instance, if the Commercial Affairs Department (CAD) of the Singapore Police Force were to ask a bank to disclose the names of the customers who bought gold tentulas from them, is this a banking secrecy issue? Is this a disclosure of Customer Information? It is of note that the definition of "Customer Infonnation" in section 40A does not include any "Account Information" and "Deposit Information" that is not referable to any named customer or group of named customers. So disclosure of unnamed global figures relating to customers' account is permissible. In ascertaining the scope of Customer Information, it is also useful to bear in mind the definition of a "customer". Again, if the information relates to an entity which does not come within the definition of a "customer", there is no banking secrecy issue. No "customer", no "Customer Information", hence no banking secrecy. It is worth noting that banks themselves are not considered "customers" (however, MAS and other central banks are, hence banking secrecy still apply).[777]

6.6.8 Section 47 of the Banking Act – Disclosure of Information is an Offence

The "general rule" of banking secrecy is enshrined in section 47(I), which states:

[777] Tan Siu Liang, 'Singapore: Money Laundering - Legal Implications for Financial Institutions' (1997) 1 *Journal of Money Laundering Control*

"Customer information" shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other persons exempt as expressly provided in this Act."[778]

In Singapore, in addition to the contractual duty, the bank's employees have a statutory duty, imposed by section 47 of the Banking Act, to keep the affairs of a bank customer confidential. Section 47(3) provides for a general prohibition against disclosure. Section 47(3) reads:

> Subject to subsection (4), no official of any bank and no person who by reason of his capacity or office has by any means access to the records of the bank, registers or any correspondence or material with regard to the account of any individual customer of that bank shall, while his employment in or professional relationship with the bank, as the case me be, continues or after the termination thereof, give divulge or reveal any information whatsoever regarding the money or other relevant particulars of the account of that customer.

This is followed by a number of exceptions in section 47(4), which provides that section 47(3) shall not apply:[779]

(i) Where there is consent (which, since the 1984 amendment to section 47, must be written);

[778] Ibid.
[779] Ibid.

(ii) Where the customer is declared a bankrupt (or is being wound up, in the case of a company);

(iii) In Civil proceedings –

a) between the bank and the customer or, since the 1984 amendments, between the bank and its customer's guarantor relating to the customer's banking transaction, or

b) in which the bank is one of a few parties making adverse claims to money in the client's account where the bank seeks relief by way of interpleader;

(iv) Where the officials of the bank are compelled under any written law in force in Singapore to co-operate with authorities investigating or prosecuting a crime;

(v) Where the client's monies are attached under a garnishee order (introduced in the 1984 amendments);

(vi) Where the branch of a foreign bank forwards information required by its head office relating solely to credit facilities which it has granted the customer (introduced in the 1984 amendments), or

(vii) Where information which, since the 1984 amendments may only be of "a general nature", is required to assess the customer's creditworthiness in connection with a bona fide commercial transaction or a prospective transaction.

6.6.9 Consent under Section 47

It will be noticed that, whereas in England, consent can be implied from the surrounding circumstances of the case, since the 1984 amendments to the Banking Act, permission must be granted in writing under section 47.[780]

However, the position on banker's references is provided in section 47(4)(g), which permits the disclosure of information required

> … to assess that creditworthiness of a customer in connection with or relating to a bona fide commercial transaction or a prospective commercial transaction, so long a the information required is of a general nature and in no way related to the details of a customer's account.

Hence, the statutory exception in relation to the whole area of consent and banker's references may be restated as follows:

> Except for information relating to a customer's creditworthiness, it is an offence to divulge information relating to the money or relevant particulars of a customer's account without his written consent. In relation to requests for credit references, the information required must be:
>
> 1) Required to asses the customer's creditworthiness;
> 2) Required in connection with or relating to a bona fide commercial transaction which may be a prospective transaction, and
> 3) Of a general nature, unrelated to the details of the customer's account.

[780] This would appear, at least on one view, to still leave open the possibility of 'implied written permission'. See Soh Kee Bun, *Current Developments in International Banking and Corporate Financial Operations* 298.

Of course, banks must bear in their mind that in giving such references, they have a duty towards the recipients not to be negligent in addition to their duty to the customer to exercise due care in doing so.[781]

6.6.10 Compulsion by Law

It may be perceived that banking secrecy takes second place to criminal investigations in Singapore because wide powers to obtain information about bank accounts are conferred by legislation.[782]

The list of such legislation is set out in section 47(8) of the Banking Act, which defines "written law" to mean Part IV of the Evidence Act, the Criminal Procedure Code, the Internal Security Act, the Income Tax Act, the Prevention of Corruption Act, the Kidnapping Act, and the companies Act. Failure to co-operate renders the party concerned liable to legal penalties under the relevant legislation.[783]

However, it is interesting to note that this list of legislation appears scanty compared to the position in the United Kingdom, where the Jack Committee has identified at least 19 Acts requiring disclosure to the authorities.[784] In Singapore, such investigations are also the exception rather than the norm, and the vast majority of banking transactions are protected by the general rules of secrecy at Common Law and under section 47 of the Banking Act of Singapore.

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[781] See Poh Chu Chai, *Law of Banking* (1st ed, 1989) 170.
[782] Ibid.
[783] *Banking Act (Chapter 19) 1971* (Singapore) s47(8).
[784] See the Jack Committee Report, paragraph 5.07. The legislation requiring disclosure is listed at Appendix Q to the Report.

Furthermore, wide as these powers may apparently be, it must be remembered that the officers conducting such investigations would arguably fall within the scope of persons "who by reasons of ... capacity or office has by any means" access to the bank's records, registers, correspondence, or material regarding an account.

Accordingly, they would appear to be under a duty to maintain the confidentiality of information relating to the account. The issue relating to persons prohibiting from divulging confidential information below deals with the question of whether section 47 applies to government officers.[785]

6.6.11 Exceptions to Disclosure of Information under Section 47

The exceptions to the general rule of banking secrecy are now "codified" in the form of the 6th Schedule. No disclosure of Customer Information may be made to a third party outside the 6th Schedule unless it is expressly consented to by the customer.

Reliance on the 6th Schedule becomes particularly important to a bank when the "disclosure clauses" in the printed standard terms and conditions of the account opening forms ("Ts & Cs") are silent on the particular issue at hand or the express consent from the client or clients is either unlikely or the cost and effort to obtain the consent is too prohibitive. Under such circumstances, the 6th Schedule becomes critical in deciding whether a disclosure of Customer Information can be made.[786]

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[785] Yap, above n 768.
[786] Tan Sin Liang, "Banking Secrecy – Legal Implications of the Latest Banking Act Amendments for Banks in Singapore", Ernst & Young.

6.6.12 Further or Secondary Disclosures

The 6^{th} Schedule (which is divided into 3 columns) defines the scope and the conditions for disclosure without the customers' consent. The 1^{st} column defines the purpose for which the Customer Information may be disclosed. The 2^{nd} column defines the persons who may receive the Customer Information ("Disclosees"). The persons disclosing such information will be the bank employees under the Part I and Part II Disclosees. The 3^{rd} column defines the conditions (if any) under which the Customer Information may be disclosed. Part I is where further disclosure is permitted and Part II is where further disclosure is prohibited unless allowed under the 6^{th} Schedule.

A new concept is introduced in the 6^{th} Schedule to limit the further disclosure of Customer Information under certain circumstances. Under the 6^{th} Schedule, a bank is allowed to disclose Customer Information (for the purposes specified in the 1^{st} column) to the permitted Disclosees (2^{nd} column). This is regarded as "Primary Disclosure" here. Under Part I of the 6^{th} Schedule, the Disclosee is allowed to further disclose to a third party. This is regarded as "Secondary Disclosure" here. Under Part II of the 6^{th} Schedule, no Secondary Disclosure is allowed unless it is authorised under the 6^{th} Schedule or if it is sanctioned by a court order[787]. It is therefore, of utmost importance for Part II Disclosees not to disclose Customer Information to a third party unless it is sanctioned under either of these two conditions. As a general rule, the Customer Information flow stops at the Part II Disclosees.[788]

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[787] See s. 47(6).
[788] Tan Sin Liang, above n 786.

6.6.13 Higher Confidentiality Agreement (HCA)

A new section 47(8) was introduced under the Amendments in 2001 to allow a bank and its customers to enter into an "express agreement for a higher degree of confidentiality" than that prescribed in section 47 and the 6th Schedule ("Higher Confidentiality Agreement" or HCA). This expression probably means a more restrictive disclosure than that provided in section 47(1) and the 6th Schedule. In other words, section 47(8) allows a bank and its customers to contract out of the statutory exceptions in the 6th Schedule for a more restrictive disclosure. The question is to what extent can a bank, or should a bank, contract out of the 6th Schedule? Unlike a commercial agreement between a bank and its customer, a HCA is not a laisser-faire agreement. Tan asserts that there are obvious legal constraints and "boundaries" as to how far two contracting parties can contract out of the Banking Act.

Before exercising caution and prudence in negotiating the terms and the scope of the HCA, banks should be vigilant in inquiring into the customer's desire to operate their account under a level of secrecy which is higher than normal (i.e. 6th Schedule). Banks should be inquiring whether this could be a sign of avoiding detection of some criminal activities by the customer. In the light of the above, Tan has argued that banks are unlikely to be in a hurry to sign HCAs with their customers. It will be more costly to administer and more onerous to manage such accounts. Who are more likely to ask a bank to sign a HCA? Such customers are likely to be the bank's "private banking" clients. Even for such clients, care and prudence must be exercised in negotiating a HCA.[789]

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[789] Ibid.

6.6.14 Persons Prohibited from Divulging Confidential Information

The statutory duty under section 47 covers officials of any bank defined in subsection (8) to include directors and employees. The definition is not exhaustive.

The statutory duty also applies to any "person who by reason of his capacity or office has by any means access to the records of the bank, registers or any correspondence or material with regard to the account of any individual customer of the bank". That is, apart from accountants, it apparently also applies to officials of government bodies who are authorised to look into bank accounts, as well as all others who have access to the bank's records by virtue of their capacity or office.

One argument against the extension of section 47 to government officials is that the provision that the duty is to last "while his employment in or professional relationship with the bank, as the case may be, continues or after the termination thereof" would seem to imply that only employees or those subject to some form of contractual relationship with the bank are subject to the section 47 duty.

Against that, it could be countered that section 47 utilises the term "employment in" the bank as opposed to "employment by" the bank and also that the term "professional relationship" is defined by section 47 to include, i.e., it is not confined to, the bank's relationship with a computer bureau. Furthermore, there is no restriction in section 47 that the persons who would thereby gain access to the bank's records need do so as a result of their office or capacity within the bank.

Yap argues that this would have been easy enough to provide had it been the legislative intention. It would therefore appear that section 47 could not be wide enough to cover government officials.

By its Notice to Banks, MAS 614, issued pursuant to the 1984 amendments to the banking secrecy provisions, the MAS has laid down requirements aimed at ensuring that auditors of the head offices of foreign banks comply with the statutory duty of secrecy. MAS 614 spells out clearly that the prohibition under section 47 of the Banking Act 'covers all persons regardless of whether they are residents or non-residents'.

It also provides that internal auditors or inspectors from the head offices of foreign banks are required to comply with section 47 should they gain access to the records of the accounts of individual customers in the course of the audit or inspection. Prior to such audit or inspection, they are also required to submit to the MAS statutory declarations that they are aware of the requirements of section 47 of the Banking Act and will strictly observe them. A copy of the inspection or audit report to the head office must also be submitted to the MAS.[790]

6.6.15 Duration and Subject Duty of Statutory Duty

A banking officer or other person who acquires information relating to an account is required, in the words of section 47(3), not to "give, divulge or reveal" it "while his

[790] Yap, above n 785.

employment in or professional relationship with the bank, as the case may be, continues of after the termination thereof". Since no mention is made of the duty lapsing after a reasonable period, it would appear to impose a perpetual vow of silence.

Section 47 prohibits those concerned from giving, divulging, or revealing "any information whatsoever regarding the money or other relevant particulars of the account of [the bank's] customer". It will be noticed that a moratorium is imposed on "any information whatsoever", that related to:

1) The money in the customer's account, or
2) Relevant particulars of the account.

It would appear that according to Yap, an omission has been made in respect of the affairs of the customer other than the money in, or relevant particulars, of the account. The situation in *Tournier*, for example, would apparently fall outside the wording of section 47 as the information divulged in that case was that the banks' customer had diverted the proceeds of a cheque to his bookmaker. This neither relates to the money in his account, nor is it a particular of his account.[791]

6.6.16 Enhanced Protection

The statutory framework for banking secrecy is further enhanced by the fact that despite having a wide supervisory jurisdiction over banks, which empowers it to

[791] Ibid.

conduct investigations of banks' books, the MAS is required by sections 44 and 45 of the Banking Act to do so under conditions of secrecy.

Furthermore, section 47(1) of the Banking Act specifically states that the MAS is not authorised to inquire into the affairs of any individual customer of any bank. Finally, section 47(2) provides that any incidental information relating to the affairs of an individual customer obtained by the MAS shall be secret between the MAS and the bank. Doubtless, any MAS official who comes into possession of such information in the course of investigations also would be under a section 47 duty of secrecy.

The position regarding merchant banks is broadly similar. It is also found in Directives 11 and 12 of the MAS Directives to Merchant Banks. Directive 6 of the MAS Directives to Merchant Banks also provides that any information which a merchant bank is required to furnish to the MAS to enable the latter to supervise the merchant bank 'shall be secret as between that merchant bank and the Authority'.[792]

6.6.17 Comparison of Common Law and Statutory Duties

A comparison between the Common Law duty and the statutory duty shows that:

1) The Banking secrecy laws of Singapore provide for contractual liability for the bank with criminal liability for the bank's directors, employees, accountants, and other persons whose office or capacity would give them access to the bank's records, who would not be contractually liable;

[792] Monetary Authority of Singapore, Directives to Merchant Banks (1985) <http://www.mas.gov.sg/masmcm/bin/pt1Directive_6__Information_to_be_Furnished_by_Merchant_Banks.htm> at 10 July 2004.

2) Until the 1984 amendments, the section 47 exceptions were almost identical to the Common Law exceptions;
3) The exceptions provided under section 47 are (since the 1984 amendments) more numerous than those available in England under the Common Law;
4) The consent exception in section 47 now requires the customer's authorisation to be written while, under the Common Law position, consent can either be expressed or implied, and
5) The public interest exception is not included in section 47, with the result that academic opinion on its applicability in Singapore is divided.

Yap's view is that a contractual duty of confidentiality is implied into the banker-customer contract by the Common Law applied vide section 5 of the Civil Law Act is clear as section 47 does not deal with implying a contractual duty. That a statutory duty exists on the part of its employees, directors, and others with access to confidential information and the extent of that duty is clear from section 47 of the Banking Act.[793]

6.6.18 Does the Public Interest Exception Apply in Singapore?

This is however a point of view that 'it is arguable that the Common Law exception of disclosure in the public interest can be applied.'[794]

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[793] Yap, above n 791.
[794] See Soh Kee Bun, "Banking Secrecy and Taking Evidence Abroad" (1989) Vol IX of the Singapore Conferences on International Business Law series, titled *Current Developments in International Banking and Corporate Financial Operations* 298.

It also has been argued that section 47 is not exhaustive as 'such an interpretation is too restrictive' as section 47 'does not cover certain situations where banking secrecy will be justifiably encroached upon' such as the situation in *Sunderland*, where it was in the bank's interest to make a disclosure in circumstances other than those provided in section 47.[795]

According to Soh, it can be further argued against interpreting section 47 as being exhaustive as the provision 'does not deal with situations where banking secrecy can be violated if the bank has a public duty to disclose other than under compulsion of law.' This view is supported by the example of legislation amended or enacted to enable the accounts of suspected drug smugglers to be disclosed, which 'may not be written law as defined'.[796]

Poh asserts that one line of reasoning supporting such views would be as follows. Applying section 5 of the Civil Law Act, the issue or question of whether a banker is permitted to make disclosure in the public interest would be decided in the affirmative under English Common Law. The application of Common Law would not be ousted by the existence of section 47, as section 5 of the Civil Law Act only provides that English law will not apply where there is a corresponding piece of legislation enacted by the Singapore parliament. Since section 47 imposes a statutory duty, it is not such a piece of legislation.[797]

[795] See Myint Soe, "Changes in the Law Relating to Banking Secrecy, The Banking (Amendment) Act 1986", [1983] 25 Mal. L.R. 387, p. 391
[796] Ibid 390.
[797] Poh, above n 782, 167.

Furthermore, besides being a Common Law duty, the banker's duty of confidentiality is a contractual one, giving rise to civil liability, while section 47 serves a different purpose, namely that of making the persons responsible for divulging the information, who would not be contractually liable, subject to criminal liability.

The opposing view is that the issue should be characterised as what exceptions to the contractual duty operate in Singapore. Characterised in that way, the Common Law exceptions would have to be modified by section 47 because section 5(3)(a) of the Civil Law Act requires the Common Law to be applied 'subject to such modifications and adaptations as the circumstances of Singapore may require.'

Hence, the position would be that criminal liability for disclosure is imposed by section 47 of the Banking Act while the Common Law operates concurrently to impose contractual liability, but the Common Law exceptions are modified in that they are restricted by the exceptions listed in section 47. It also may be argued that, in respect of a customer's affairs, apart from the money in or other relevant particulars of an account, the Common Law contractual duty applies without modification.

For example, it can be argued that, since one of the cardinal principles observed by the courts in implying terms into a contract is that an implied term must not be contrary to law, the Common Law exception of public interest cannot apply in Singapore.[798]

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[798] Ibid.

This school of thought as highlighted by Poh, would point out that there is yet another weakness in the view that the Common Law exceptions can apply if they are excluded from section 47. That is, it relies on an unnatural distinction between the bank and its employee, excusing on the part of the institution acts which it could only do through its employees and which are crimes under written law.

It is hence argued by Poh that in Singapore the contractual duty is separate and distinct from the statutory duty imposed by section 47 and that the legislation never intended section 47 to replace it. This is supported by the fact that the purposes or functions and the subject matter of the two duties differ.

The Common Law imposes a contractual duty on the bank because of the intimate knowledge that a bank acquires into its customer's affairs, whereas section 47 imposes criminal liability on persons described therein who would not be contractually liable to the customer since they are not party to the contract between the customer and his bank.

Considering the width of investigative powers given to the authorities in Singapore, the public interest exception might not be very useful even if it were applicable in Singapore. First, most investigations would be conducted under the receptive pieces of legislation mentioned earlier. Second, the disclosure of information under the Common Law public duty exception would be subject to restrictions very similar to those outlined in the statutory provisions.

When the MAS conducts investigations, it does so under conditions of secrecy, only general information may be sought, it may not inquire into the affairs of any specific customer, and any incidental information acquired is to be kept secret. That this is very similar to the factors applicable to the public interest exception will be apparent from a later discussion.

The above analysis of the issue of bank secrecy demonstrates the rigour with which Singapore's confidentiality platform is enhanced to support the global wealth management industry.[799]

6.6.19 Public Interest Exception at Common Law

An interesting Common Law decision on the public duty exception in the recent case of *Price Waterhouse v. BCCI Holdings (Luxembourg) S.A. & Others*[800], reported in *The Times* on October 30, 1991.

In this case, the High Court of England decided that the public interest in maintaining the confidentiality owed by a bank to its customers might be outweighed by some countervailing public interest in disclosure, and the latter was not limited to the public interest in detecting or preventing wrongdoing.

Hence, it ruled that Price Waterhouse (PW) could be permitted under the exception to make disclosures of certain confidential information to an enquiry set up to review BCCI's past performance of its statutory functions. PW was seeking to give evidence

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[799] Ibid.
[800] *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583

voluntarily without BCCI's consent as the enquiry, not having been convened under the Tribunals of Enquiry and Evidence Act 1921, could not compel the disclosure of confidential information.

At issue was the question whether voluntary disclosure could be made without the consent of BCCI, to whom PW owed a duty of confidentiality. The court decided that, as the United Kingdom legislature had conferred a general power of supervision upon the Bank of England, there was an important public interest in the effective regulation and supervision of authorised banking institutions and the protection of depositors. It held that this public interest ought to prevail over the interest in confidentiality. A few points from Millet J.'s[801] decision are worth noting:

1) The scope of disclosure was limited – The interest in disclosure to the enquiry was at least as wide as the interest in disclosure to the Bank of England, "provided that dissemination of such information was no wider in the latter case than would be authorised in the former case" (the powers of the MAS and the Bank of England are similar).
2) Infrequent and less serious invasions – The enquiry would be dealing with matters more abstract and remote from the details of the underlying banking transactions than the Bank of England in its routine supervision; it was less likely that details of particular accounts would require to be identified, and the occasions when banking confidentiality was invaded were likely to be fewer and less serious.

[801] The United Kingdom Parliament, *Judgments - Regina v Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd* (2002) <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd020516/morgan-2.htm> at 30 April 2004.

3) The enquiry had undertaken to respect confidentiality – It would do this where it could properly do so. The extent to which confidentiality would be invaded would depend upon the judgement of responsible persons at several different levels.[802]

6.6.20 Public Interest and Compulsion by Law

In the BCCI case discussed above, the court inferred the existence of a public interest in the proper supervision of financial institutions from the fact that section 1 of the United Kingdom Banking Act 1987 imposes a duty on the Bank of England "generally to supervise the institutions authorised by it in the exercise of" its powers.

In Singapore, the MAS has a similar duty. Section 28 of the Monetary Authority of Singapore Act, Cap 186 (MAS Act), empowers the MAS to approve financial institutions and control their operations and section 27 of the Act provides that the MAS may, if it thinks necessary in the public interest, request information from and make recommendations to such financial institutions as the Authority may from time to time determine.

The MAS also may issue directions under section 27 for the purpose of securing that effect is given to such requests or recommendations.

The similarity between the approach of the Common Law "public interest exception", and the "compulsion by law" provisions of which the MAS provisions provide an

[802] Yap, above n 793.

example, does not need to be belaboured. So great is the similarity between the two that the Jack Committee has described the compulsion of law exception as a codification of the public duty exception and the purpose of the latter as being "to catch those items which have not yet been codified".[803]

In the United Kingdom, as noted previously, there were 19 Acts requiring disclosure to the authorities at the date of the Jack Committee's Report, and the Committee therefore recommended an exhaustive codification of all relevant legislation, requiring disclosure, with the further recommendation that all subsequent disclosure requirements should only be added by way of amending that provision.[804]

6.6.21 Conclusion

In conclusion, as can be seen from the above analysis, in Singapore, the duty of banking confidentiality in respect of the client's affairs stems from two sources:

(i) The duty of confidentiality implied by the Common Law by virtue of the banker-customer relationship, and

(ii) A statutory duty imposed by section 47 of the Banking Act (referred to herein as the "section 47 duty" or "the statutory duty").[805]

The "general rule" of banking confidentiality is enshrined in section 47(1), which states:

[803] See the Jack Committee Report, paragraph 5.06.
[804] Yap, above n 802, 577-601.
[805] Chapter 19 of the 1985 Revised Edition of the Singapore Statutes.

Customer information" shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other persons exempt as expressly provided in this Act.[806]

And whilst exceptions are provided under section 47(4), none of the above would contradict the recommendations of the supranational organisations.

6.7 Exchange of Information – Mutual Legal Assistance

Following the discussion of its second mutual evaluation report at the FATF Plenary meeting in February 1999, the Singaporean delegation reported back in June 1999 on the measures that it would be introducing. In September 1999, Singapore advised that its Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1999 was passed on 6 July 1999 and came into force on 13 September 1999. The amending legislation extended the money laundering offence to a wide range of serious crimes, increased the powers to confiscate criminal assets, clarified tbe requirement to report suspicious transactions, and introduced several other measures to enhance the anti-money laundering regime. On the provision of mutual legal assistance, Singapore enacted the Mutual Assistance in Criminal Matters Act, which came into effect on 1 April 2000, to provide for a more comprehensive legal framework for mutual assistance in legal matters.[807]

The Mutual Assistance In Criminal Matters Act 2000 came into force on 1 April 2000. The Act facilitates the provision and obtaining, by Singapore, of international

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806 Ibid.

807 Financial Action Task Force, *Singapore* (2001) <www1.oecd.org> at 9 November 2003.

assistance in criminal matters. It provides the legislative basis for Singapore to enter into arrangements with other countries for international co-operation in criminal matters. The forms of assistance provided for by the Act include:[808]

1. the obtaining of evidence and other articles;
2. the making of arrangements for persons to give evidence or assist in criminal investigations;
3. the recovery and forfeiture of, and the restraining of dealings in, proceeds and instrumentalities of crime;
4. the execution of requests for search and seizure;
5. the location and identification of persons; and
6. the service of documents.

In general, assistance under the Act may be obtained or provided in relation to any 'criminal matter', which is defined to mean a criminal investigation, criminal proceedings or an ancillary criminal matter (ie the restraining of dealing in, or the seizure, forfeiture or confiscation of, proceeds or instrumentalities of crime, or the obtaining, enforcement or satisfaction of a confiscation order).

The criminal matter must –

1. in the case of assistance sought by Singapore, relate to a Singapore offence, ie an offence in the First or Second Schedule to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (the CDTSCA); or

[808] *Mutual Assistance in Criminal Assistance Act* (2000) (Chapter 190A).

2. in the case of assistance sought by a foreign country, relate to a foreign offence, ie a drug offence or an offence that consists of or includes conduct which, if it had occurred in Singapore, would have constituted an offence under the Second Schedule to the CDTSCA.[809]

Singapore Minister for Foreign Affairs and Minister for Law, Professor S Jayakumar signed a mutual legal assistance treaty with the United States Ambassador to Singapore, Mr Steven J Green on 3 November 2000. This is the first mutual legal assistance treaty signed by Singapore. Earlier that year, the Singapore Parliament passed the Mutual Assistance in Criminal Matters Act which set out the legal basis for Singapore to enter into mutual legal assistance treaties.

The treaty provided a framework for cooperation between Singapore and US authorities in the fight against drug trafficking. It strengthens the relationship between the law enforcement agencies of the two countries and increases their ability to provide assistance to each other, and also to serve as an important tool in the fight against drug trafficking offences.

Under the treaty, the law enforcement authorities of Singapore and the United States provide assistance to each other in investigations, prosecutions and related proceedings concerning drug trafficking and drug money laundering offences.

Forms of assistance available include taking testimony of witnesses, releasing documents and records, locating and identifying persons or evidence, serving

[809] Elizabeth Wong, *Legislation Update* Allen & Gledhill <www.lawgazette.com.sg> at 9 November 2003.

documents, executing requests for search and seizure and freezing and forfeiture of proceeds of drug trafficking.[810]

This enhancement of the legislation has further strengthened Singapore's global reputation as a compliant jurisdiction.

6.7.1 SCA's compliance with FATF 40 Recommendations[811]

The SCA has, to a large extent, provided the legal framework for Singapore to embrace the FATF's 40 Recommendation. In particular, it has:

(i) Criminalised non-drug related serious crimes, albeit not all serious crimes (R5);

(ii) Adopted objective knowledge in establishing the offence of money laundering (R6);

(iii) Imposed penalties against corporations themselves and not just their employees (R7);

(iv) Provided confiscation or forfeiture powers (R8);

(v) Extended money-laundering law to non-bank financial institutions (R9);

(vi) Imposed a statutory requirement for the retention of financial transaction documents for more than five years (R14);

(vii) Provided statutory protection requirement for the retention of financial institutions and employees against criminal and civil proceedings in good faith reporting of suspicious transactions (R16);

(viii) Criminalising tipping-off offences (R17);

[810] Ministry of Law, *Singapore & US sign agreement on co-operation against drug trafficking* (2000) <http://www.minlaw.gov.sg> at 9 November 2003.

[811] See Appendix G for the list of FATF's 40 + 8 Recommendations against money laundering.

(ix) Made reporting of suspicious transaction mandatory (R18);

(x) Facilitated the issuance of anti-money-laundering guidelines through MAS (R28);

(xi) Provided the legal framework for Singapore to enter into mutual legal assistance treaties (MLAT) with other countries in relation to Production Orders, Search Warrants, Confiscation Orders for foreign offences (R37 and R38); and

(xii) Recognised money laundering as an extraditable offence (R40)

The new legal regime under the SCA has given more teeth to Singapore's anti-money laundering laws. Hence, its law enforcement agencies are now better armed to combat money-laundering activities in Singapore and the Asia Pacific region.[812]

Singapore bas in place a sound and comprehensive legal, institutional, policy and supervisory framework for Anti Money Laundering/Combating the Financing of Terrorism (AML/CFT). The legal system is well regarded, with a low crime rate, an intolerance for corruption, and an efficient judiciary. Singapore has taken systematic and effective steps to address many of the recommendations of the FATF mutual evaluation in 1998–1999. The Corruption, Drug Trafficking and other Serious Crimes Act criminalized money laundering for a range of serious offences beyond drug trafficking, imposed a duty on all persons to make reports of suspicious transactions, and changed the criminal intent requirement for criminal ML offences to a reasonable ground to believe standard. Singapore has in place a framework for the provision of mutual assistance through the enactment in 2000 of the Mutual Assistance in Criminal

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[812] Tan, above n 747, 264.

Matters Act (MACMA). Legally-binding Notices issued by the MAS imposed sector-specific requirements and guidance in the areas of customer due diligence, internal controls, audit, and training, among others. These legislative and regulatory changes as well as institutional efforts to improve feedback to institutions, enhance supervisory oversight, and improve training resulted in a significant strengthening of Singapore's framework.

However, according to the IMF, there remain areas requiring attention. There are limitations on Singapore's ability in practice to provide particular kinds of mutual legal assistance such as the provision of bank records, restraint of proceeds, and enforcement of confiscation orders. Customer identification measures for wire transfers need to be put in place by February 2005, as recommended by FATF Special Recommendation VII. The Palermo Convention has yet to be ratified. The authorities recognize that to comply with the revised FATF 40 Recommendations of June 2003, the current sector specific Notices should be updated during 2004. While providing valuable guidance, the principles-based Notices could be improved by making their provisions more detailed and direct, supplementing the current statements of principle with firm provisions and explicit guidance to assist financial institutions in the practical implementation of effective AML/CFT measures. Work on amendments to the sector-specific Notices has already commenced. Singapore has provided a framework for mutual legal assistance through MACMA but the lack of treaties or other relationships means that certain forms of assistance are not available to foreign authorities. Non-coercive measures (service of process and location of persons) and taking of evidence for foreign criminal proceedings are available, but assistance requiring coercion, for example, the provision of bank records, production orders, search and seizure, pre-trial restraints, proceeds identification and tracing, and enforcement of foreign confiscation orders, may be provided only to "prescribed" countries, currently limited to the U.S. for drug trafficking matters. Singapore has also signed a mutual legal assistance treaty with Hong Kong in June 2003, which will come into operation as soon as the Parties have ratified it.[813]

6.7.2 Conclusion

From the above analysis, it can be seen that Singapore supports the exchange of information and mutual legal assistance under the MACMA. This may be achieved or provided in relation to any 'criminal matter', which is defined to mean a criminal investigation, criminal proceedings or an ancillary criminal matter (ie the restraining of dealing in, or the seizure, forfeiture or confiscation of, proceeds or instrumentalities of crime, or the obtaining, enforcement or satisfaction of a confiscation order).

Despite the enlargement of the SCA to encompass the scope of money-laundering, tax evasion (which includes duty evasion, exchange control and capital control evasion) is not listed as a serious crime and thus Singapore is not obligated to offer mutual legal assistance in tax matters, which is now the subject of the recent June 2004 OECD report entitled *A Process for Achieving a Global Level Playing Field*.[814]

6.8 Conclusion

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[813] International Monetary Fund, above n 739.
[814] Organisation of Economic Co-operation and Development, above n 18.

The above analysis of Singapore's position in regard to harmful tax practices, money laundering, confidentiality and exchange of information, as revealed by its responses to the supranational organisations, OECD, FATF, IMF and the Wolfsberg Principles, demonstrates how the city State has been progressively positioning itself over the past five years to take advantage of the changes in global regulatory dynamics, particularly affecting European investors whose funds have been traditionally held by Swiss banks.

(i) EU's Directive on the Taxation of Savings

Singapore and Hong Kong, which have long been keen to establish themselves as offshore financial centres to rival Europe's, and which already hold an estimated US$500 billion in offshore funds,[815] are most likely to benefit from the EU's Directive on the Taxation of Savings. Indeed, Singapore, which displaced Luxembourg as the number two offshore banking centre of choice[816] is especially well-placed ahead of Hong Kong.

Singapore has positioned itself as a first-class global wealth management centre. Among its advantages are a stable political environment, a good reputation as a well-run centre with transparent rules and a position close to Asia's growing economies, but not too close to locations where political developments may still be difficult to predict.

Hong Kong, though rated alongside Singapore as one of the most sophisticated offshore centres in the world, suffers from its proximity to China and investors unease

815 According to the 2003 survey of Boston Consulting Group.
816 IBM Business Consulting Services' 2003 survey of the European private-banking industry.

over the long-term implications of control from Beijing. But it could still benefit from the expected movement of funds from Europe in spite of recent comments from Beijing meant to put the market and the pro-democracy movement on notice.[817]

Perhaps a key reason the Swiss participants are keen to expand into Asia is that even without law changes, the offshore banking system is well under review. In its annual survey of this field, published in July 2003, the Boston Consulting Group says Swiss wealth managers are entering a highly competitive phase during which they will fight for new clients and market share. This is because the overall asset base is shrinking, revenue growth is lower and there is low growth in new business. According to the report, wealth managers need to develop proactive strategies, enabling them to defend their offshore positions and develop a strong global onshore presence. Geographic diversification, is one strategic option.[818]

However, as Singapore makes the regulatory changes and manages to win substantial business from Switzerland and the other traditional offshore centres, these established financial institutions are unlikely to find life any easier. Not only are the Singapore authorities keen to demonstrate the purity of their systems by introducing tougher regulations, but clients are no longer content to have their assets sit idly in their bank vaults. Offshore or onshore, the clients want their assets to work and will seek geographical and jurisdictional diversification to ensure such a situation.[819]

(ii) Singapore – an alternative to Switzerland

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[817] Ching, above n 697.
[818] Roger Trapp, 'Asia's Offshore Centres will Benefit from Europe's Tightening Regulations', *The Asian Wall Street Journal* (Singapore) 10 September 2003.
[819] Ibid.

Will Singapore replace Switzerland as the world's premier centre for private banking? Not immediately. But it is possible that in the next 5 years, a portion of the US$2.2 trillion of private money managed by banks in Switzerland (as at the end of 2002) will flow to the republic – thanks partly to catalytic tax changes within the European Union (EU) and Switzerland.

In June 2003, the EU agreement with Switzerland to claw back some tax revenue from income earned on assets of EU citizens that are held by Swiss banks, opened the gates for the capital outflow of assets under management by its private banking industry.

Under the deal, in 2005, EU-based clients of Swiss banks will face a 15 per cent tax on income and / or dividends from assets – such as bonds – purchased from their Swiss bank accounts. The taxes will be passed on directly by the Swiss banks to the governments of the clients' home countries, without the clients' names being revealed. The deal allows Switzerland to maintain its banking secrecy laws, while permitting the governments of EU countries to collect tax revenue that has, thus far, eluded them. Over time, the tax rates will be raised, in stages, to a maximum of 35 per cent.

After 2005, therefore, private banking clients who keep assets in Switzerland will be faced with the prospect of lower – and progressively declining – post-tax rates of return on their holdings.

Many of them have already been induced to move their money elsewhere. According to Vikram, many Swiss banks consider Singapore a better alternative, and are gearing up for the shift, since the regulatory and legal systems are in place, these global investors are starting to vote with their feet; a clear vote of confidence in Singapore's compliance with the supranational directives.[820]

(iii) Singapore – Financial System Stability Assessment

Singapore has evolved into a major regional asset management centre over the past few years in response to the government's efforts to develop this industry and now hosts more than 200 asset management firms. Total assets managed by Singapore-based financial institutions increased from S$151 billion in 1998 to S$344 billion in 2002. This increase can be attributed to transfers of regional portfolios to Singapore for management and continued expansion of management and advisory activities for the pan-Asian region in light of Singapore's sound legal and tax environment and highly developed infrastructure. Some asset managers also centralized their regional trading and back office functions in Singapore. Of the S$183 billion of discretionary assets as of end-2002, 30 percent came from Singapore and the rest from abroad – mainly Europe and the United States.

Although the regulatory systems and supervisory practices exhibit a high degree of observance of international standards and codes, the IMF made some specific recommendations to further enhance the risk-based regulatory and supervisory

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[820] Vikram, above n 712.

framework, strengthen the accountability and independence on the MAS, and improve monetary and financial policy transparency.[821]

In this chapter's analysis of Singapore as a compliant jurisdiction, it was seen that Singapore complies well and in particular with most of the assessable FATF (40 + 8) Recommendations. The main deficiency is revealed in the provision of mutual legal assistance. Even so, in the next and final chapter of this thesis, the argument in favour of Singapore is summarised and concluded.

[821] International Monetary Fund, above n 813, 36.

Chapter 7 Conclusion

7.1 Introduction

In 1998, the Committee on Fiscal Affairs of the OECD embarked upon a major new project to eliminate what it considered harmful tax practices in both OECD member and non-member countries. It issued a lengthy discussion draft entitled *Harmful Tax Competition: An Emerging Global Issue*.[822]

In the guise of an effort to promote transparency and information exchanges in tax matters globally, the supranational bodies have ostensibly sought to prevent and eradicate tax havens and preferential regimes. Although theoretically aimed at tax evasion, its impact, has been to reduce tax minimisation opportunities for legitimate international business activities.

The analysis of the response to the subsequent efforts of the OECD et al, by the OFC's has been the theme of this thesis. However, the subsequent emergence of Singapore as the compliant jurisdiction of choice, is now the final conclusion of the thesis.

7.2 Money Laundering & Harmful Tax Practices

Currently, with regard to tax havens, the scope of the project has been reduced to solely promoting transparency and information exchange, a position supported by the

[822] Organisation for Economic Co-operation and Development, above n 738.

international community. At this point in time, as analysed in this thesis in Chapter 5, it has been argued that the majority of the OFC's, as selectively represented from the Caribbean, Pacific Basin, Europe, Indian Ocean and Asia, have agreed to co-operate within the OECD's timetable.

However, to approach money laundering solely from the perspective of the legal mechanisms available directly against launderers and their impact upon human rights, is to miss important aspects of the impact of money laundering upon the legal environment. The other side of the coin is to do with financial services' regulation and its relationship to the duties of professionals. The advent of money laundering regulation has altered the nature of the relationships many professionals have with their clients. The argument for regulation and reporting requirements is that only thus can suspicious transactions be located. The argument against regulation was that the regulatory structures are just a further unnecessary intrusion, expense, and disruption of professional relationships, which do little to apprehend launderers or to affect levels of laundering.[823]

The international drive against money laundering has led to pressure for homogenisation of substantive criminal laws and enforcement mechanisms as between countries. As was seen in Chapter 5, legislation was introduced or amended in these jurisdictions and territories to allow them to comply with the OECD and FATF recommendations. In so doing it has helped recast the relationships that existed between Nation-States. From the point of view of individual States, it has provided the strongest challenge to the traditional concept of criminal law as being one matter

[823] Duncan E Alford, 'Anti-money laundering regulations: a burden on financial institutions' (1994) 19 *North Carolina Journal of International Law and Commercial Regulation* 437.

in respect of which the sovereignty Nation-State is still the predominant political unit. English criminal law is now unashamedly the handmaiden of international markets.[824]

After the Human Rights claims, the imposition of duties upon professionals was seen as the most hotly contested area of Money Laundering Law. From a position of scant compliance to one of resentment the mood has shifted at least to unenthusiastic but fearful compliance. Subject to the argument from competition, client confidentiality appears to have been given up by bankers and accountants, and has been retained in the legal profession only by the making of some concessions. Alldridge asserts that nothing will concentrate professional minds better than a sentence of six months' imprisonment for a solicitor who had pleaded guilty to failing to disclose knowledge or suspicion of money laundering that was not, in the circumstances, excessive.[825]

The period after 11 September 2001 has been a very significant one for the offshore industry. Reporting requirements have been extended, and levels of reporting have increased substantially. Privacy law is being stretched (in the case of confiscation) or ignored (in the case of forfeiture, and perhaps, civil recovery). The professions are being pulled in at least two opposing directions.[826]

With the apparent failure of the EU tax amnesties to lead to a repatriation of the majority of the funds held in the OFCs, the individual EU countries now have to rely upon the sharing of withholding tax with Austria, Belgium, Luxembourg and Switzerland in respect of their non-compliant taxpayers. As withholding tax increases, step by step, to 35% after 1 January 2011, this will, as has been seen, lead to a flight

[824] Alldridge, above n 382, 19.
[825] Ibid 273.
[826] Ibid.

of undisclosed funds from those jurisdictions with such a high withholding tax to jurisdictions which do not apply high rates of withholding tax of this nature, such as Singapore.[827]

It is unlikely that there may be further pressure on Switzerland in the coming period as a result of increased pressure from the United States, the EU and the OECD. If the past is any guide, the Swiss, particularly following their successful negotiations with the EU, upholding the primacy of their banking secrecy, may feel vindicated in standing firm on this issue. Nevertheless, there must be the risk of the further haemorrhage of funds from Switzerland back onshore, in the face of stiffer penalties for tax evasion, increased transparency in the case of tax fraud and ongoing tax amnesty programmes in various different jurisdictions. As a result of this, the more forward looking private banks in Switzerland are increasingly looking to design financial structures for onshore families which are tax compliant in jurisdictions such as Singapore.

While prominent OFC jurisdictions like Jersey, Guernsey, the Cayman Islands, the Bahamas, and Bermuda continue to survive, smaller jurisdictions, such as Nauru and Niue, which have been unable to meet minimum requirements in respect of anti-money laundering regimes, are being forced out of the industry. This conclusion is imminent, despite the more laissez faire approach of the Bush administration, has been in no small measure due to the dramatic change in mood in the US following the

[827] Paul Stibbard, 'Thriving in a Transparent World – Understanding Clients' Needs' *Baker & McKenzie, Eight Annual International Tax and Trusts Training Course* (Singapore) September 2003.

events of September 11, 2001, and the determination that bank secrecy should never again be used as a cloak to mask terrorist conspiracies.[828]

Singapore now has in place a sound and comprehensive legal, institutional, and policy and supervisory framework for AML/CFT and the authorities have demonstrated a strong commitment to its effective implementation. Though some steps have been taken with the enactment of a domestic mutual legal assistance law and ongoing negotiations for several bilateral treaties, the effectiveness of cross-border mutual legal assistance needs to be improved as it relates to compulsory assistance at international request, including the provision of bank records.

It was noted that Singapore adopts international standards and best practices for regulation and supervision, including a comprehensive framework to combat money laundering and terrorism financing. A full member of the FATF, Singapore is committed to implementing the FATF recommendations.[829]

Singapore's laws, regulations and institutional arrangements provide a strong legal, institutional, policy and supervisory framework are deemed to be adhering to the FATF 40+8 Recommendations for the prevention and detection of ML/FT. Many of the suggestions for further improvements will be implemented as Singapore continues to strengthen its AML/CFT framework to comply with the revised FATF 40 Recommendations of June 2003.[830]

7.3 Confidentiality & Exchange of Information

[828] Ibid.
[829] Monetary Authority of Singapore <http://www.mas.gov.sg> at 3 November 2003.
[830] International Monetary Fund, above n 821.

The several challenges aimed at offshore confidentiality as a legal concept have been examined and some may be seen to be without proper basis in law and legal policy. Indeed, this thesis has analysed in detail the areas which the OFCs, and by extension the tool of offshore confidentiality, have been criticised and demonstrated the several flaws in the arguments presented. These are and include the offshore tax function, the issue of money laundering and international crime and the question of comity. The quest for privacy in commercial and personal affairs and the assertion of the privilege against self-discrimination and sovereignty are further responses to challenges to confidentiality. Justifying confidentiality in offshore finance, therefore, does involve a defence of the offshore financial sector itself. In defending the offshore sector, the legitimacy of confidentiality, one of its most important tools, is underscored.

The offshore sector is seen to be, first and foremost, an economic phenomenon created to respond to the needs of international business. Secondly, it offers safe and reliable alternatives to traditional forms of investment in onshore jurisdictions. Thirdly, the sector is supported by a legal infrastructure that derives its very legitimacy from onshore legal regimes. Offshore jurisdictions have merely adapted legal concepts and principles well known in onshore states. This factor compromises the ability of onshore jurisdictions successfully to undermine the legal foundation on which the sector is established. In many areas, such as trusts and tax, offshore practices and concepts are supported both in traditional municipal law and in international law. The offshore sector has thus created an innovative legal regime to respond to modern commercial needs. Its structure has produced a diverse and creative jurisprudence which challenges the orthodoxy of onshore legal regimes and concepts.[831]

This thesis analysed how offshore jurisdictions understand well the need for regulation, and support such regulation where it is legitimate. In matters for which there is as yet, no consensus on the acceptable reach of disclosure, such as in fiscal matters, the way forward must be through international and bilateral agreements. However, as will confidentiality in other areas of financial law and commerce, offshore confidentiality will continue to be zealously protected outside of these parameters.[832] Singapore, as analysed in this thesis, has become the compliant jurisdiction of choice.

It has been demonstrated that the threats to financial confidentiality as a viable legal concept mask the real questions which are essentially economic and political. The real concern of onshore countries is the significant financial haemorrhage from onshore countries filtering off income to offshore states. In the past, OFCs were being targeted and threatened with sanctions for activities which onshore states themselves engage in. They are attacked for laws, legal policies and practices which are not unlawful or for which there are no accepted international standards.

The OECD and FATF challenges to OFCs, premised on 'harmful tax competition' and charges of money laundering, highlight the many inconsistencies contained in the charges against OFCs and confidentiality. These compromise the objections raised by onshore states to offshore legal policy. This perhaps best explains why the UK has

[831] Antoine, above n 473, 325-6.
[832] Ibid 327.

been less hostile to OFCs than the US. Its dependencies derive considerable economic benefit from their own OFCs. This, in turn, reduced financial dependency on the UK government.

Offshore jurisdictions, it was seen, have been accused of unfair tax practices in an international fiscal environment which has reached no consensus with regards to ownership of taxable worldwide income and which recognises no limits on a country's right to set fiscal policy. It is also occurring in a global environment which encourages competition generally and condemns protectionism. As documented earlier, not only do onshore states offer fiscal incentives to non-residents but they also accept the well-established legal principle of the lawfulness of tax avoidance and the non-enforcement of foreign fiscal law, two principles which ground offshore fiscal policy.

The OECD's challenge to confidentiality because of its inherent value to tax planning vehicles, has been demonstrated to be misplaced. Where investors engage in tax planning, a legal activity, their use of confidentiality as an investment tool cannot seriously be questioned in law. Similarly, given the rule on non-enforcement of fiscal law, OFCs cannot appropriately be challenged for their refusal to deviate from offshore confidentiality norms by assisting onshore countries in disclosure efforts to harness fiscal revenue.

However, the OECD report entitled *A Process for Achieving a Global Level Playing Field* released in June 2004 seeks to renew the OECD's campaign in regard to the transparency and effective exchange of information for tax purposes, sought from significant financial centres, which includes Singapore.[833] The main point of concern is that despite the Mutual Assistance in Criminal Matters Act which provides the legislative basis for Singapore to enter into arrangements with other countries for international co-operation in criminal matters, tax evasion is not listed under the SCA. Singapore is under no obligation to co-operate with foreign countries by sharing information which facilitates tax collection.

Further, the attack on offshore confidentiality ostensibly to prevent money laundering may be questioned. Confidentiality and money laundering are often being used as scapegoats merely to obtain information on potential tax revenue of onshore states. In so doing, the OECD and its supporters have been willing to rewrite fundamental precepts of money laundering law to achieve that by encompassing even tax evasion as a predicate offence.

Such challenges also ignore the facts about money laundering in OFCs. First, as pointed out in Chapter 5, most OFCs have well regulated systems with respect to money laundering, in some cases more vigilant than onshore states. There is evidence to suggest that offshore courts are co-operative, and willing to assist in the prevention of money laundering crime in OFCs. This is well demonstrated by the many legislative improvements and treaty initiatives relating to mutual legal assistance which enhance law enforcement. Secondly, it was shown that evidence abounds that onshore financial centres, such as London and New York, are actually the true centres of money laundering proceeds.

[833] Organisation for Economic Co-operation and Development, above n 814.

The most recent challenges to confidentiality, that is, terrorist financing, can be viewed along similar lines. Indeed, there is a belief that money launderers and terrorists are too sophisticated to utilise 'red flag' OFCs for their endeavours, as such centres attract far too much attention. However, while it is clear that terrorist funds may have been concentrated onshore, OFCs have generally welcomed the opportunity to assist in the fight against terrorism. The direction taken by OFCs have been more focused on not overprotecting financial confidentiality rather than strengthening money laundering law to fight terrorism.

Yet, even amidst fears of money laundering and terrorism, offshore confidentiality and disclosure must be approached with caution and with appropriate regard for legal principles and the rule of law. As discussed, one such principle is comity, the respect which one country must give to the law of another. Just as the confidentiality law of onshore states are accepted judicially as essential in supporting commercial secrets and other commercial concerns in the national interest, so must offshore confidentiality laws also be accepted. Indeed, financial confidentiality laws in OFCs may be seen to have even more of an instrumental role than those onshore.

Similarly, the rule of law dictates that fundamental human rights must be respected in any challenges to confidentiality. In particular, the principles on privacy, the privilege against self-incrimination and search and seizure are developing, and apply to financial confidentiality. While such rights may be surrendered in for public interest, this must be done according to recognised principles of proportionality, which accords the greatest possible measure of human rights protection to every citizen. Even US citizens are questioning the siege-induced assumption that controlling terrorism must necessarily equate to an eclipse of human rights and civil liberties. Many now fear a diminution of their right to privacy.[834]

However, it is noted that in Singapore, the customer's right to confidentiality is a cardinal principle in the Singapore banking sector, and assured by statutory provisions in the Banking Act. The Banking Act prohibits a Singapore bank and its employees from disclosing customer information without the customer's written consent. Confidentiality provisions may only be lifted by a court order within a well-defined legal framework of safeguards and conditions.

7.4 Singapore's Role as a Financial Centre

From the preceding chapter it was highlighted that the sophisticated banking system, the transparent regulatory and the credible English Common law system have aided Singapore's development as a pre-eminent regional financial centre in Asia which is also underpinned by the existence of an attractive business environment for financial institutions and a desirable quality of life for professionals. Effective promotion to communicate Singapore's value proposition and financial sector opportunities has attracted financial institutions and talent to Singapore. A deep pool of financial sector expertise and pro-physical infrastructure are key components of an attractive business environment. This attractive business environment has been created by focusing on the promotion of Singapore's financial centre, education and training, taxation policies and business infrastructure.[835]

[834] Antoine, above n 832, 328-9.
[835] Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 722.

Wealth management needs are well supported by a full range of financial services. More than 500 of the world's top financial institutions are present in Singapore, engaging in a wide range of financial activities – commercial banking, investment banking, treasury activities, insurance and reinsurance, asset management and private banking. As a global forex hub – Singapore is the world's largest forex trading centre after London, New York and Tokyo. The SGX's derivatives market was the first Asian exchange to offer Eurodollar futures on Japanese and Taiwanese stock indices.[836]

Singapore is becoming the chosen ground for many offshore investors. The regional chief executive officer of Credit Suisse, explains, "The only other true global private banking centre is Switzerland, and we think Singapore shares many of the characteristics of Switzerland. It is clearly superior to most of the traditional offshore centres, and offers all the features of a world class financial centre."[837]

It has been noted that "Singapore is politically stable, it has the world's most competitive economy, the best rated legal system and is a leader in information technology. There are stringent client confidentiality laws, no taxation for non-residents, and robust anti money laundering laws. Like Switzerland, Singapore is neutral and has an international reputation as a safe and secure environment."[838]

Since Switzerland has fallen in line with the EU's Savings Tax Directive, with an estimated $2 trillion in offshore assets held by EU citizens to be affected, it is not

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836 Monetary Authority of Singapore <http://www.mas.gov.sg> at 3 November 2003.

837 Peter J Cooper, Interview with Regional CEO of Credit Suisse - Dr Alex Widmer, AME Info FZ LLC (Executive Interview, 3 February 2001).

838 Ibid.

surprisingly, that many of Europe's wealthy are reviewing other places to transfer their cash. The likely recipient of some of the outflow, is now confirmed, to be Singapore, which is not party to the EU directive.

"When you have to pay 15% and eventually 35% in taxes, you are going to have a natural attrition of funds to where you don't have that – like Singapore," said the head of Asian private banking for Société Générale in Singapore.

Although Singapore has long toiled to develop as an offshore banking center, it has had to date, modest success. However, as more private banking and fund management operations are relocated to Singapore as the trend has already commenced, assets under management will grow at a much faster rate.

Competition is limited. The global crackdown on terrorism financing means tax havens in the Caribbean and the South Pacific are blacklisted or otherwise seen as tainted. Singapore is among the few still passing the "sniff test". Hong Kong, as been noted, suffers "sovereignty risk" – Mainland China's increasing interference in the territory's affairs. "Thousands of people protesting in the streets in July 2003 didn't help that image," sais the head of Société Générale.[839]

Then to reinforce this concern, comments made by a senior Chinese official, Wen Wei Po, Beijing's mouthpiece in Hong Kong, about Hong Kong's shaky financial future:

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[839] Justin Doebele, "Taking Shelter. Singapore rival Switzerland for private banking." *Forbes Global*, September 1, 2003.

"Given our greater economic might now and Hong Kong's heavy dependency on China, to set up a new stove is not a problem. We are not afraid that such a move would trigger off a capital flight."[840]

7.5 Conclusion

This thesis has analysed the principal issues of harmful tax practices, money laundering, confidentiality and exchange of information with respect to the supranational directives in regards to OFCs.

The analysis of these directives and the responses of the major OFCs, has in conclusion demonstrated the regulatory environment of Singapore to be well-established, and supported by judicial and banking systems, which differentiate Singapore from the OFCs analysed in Chapter 5.

It has heen argued that Singapore has satisfied the recommendations of the OECD, FATF, FSF and the Wolfsberg Principles in terms of harmful tax practices, money laundering, confidentiality and exchange of information.

With these basic pillars in place, the city-state has now positioned itself to emerge as a possible beneficiary of the flight of funds from Europe.

[840] Ching, above n 817.

Switzerland's decision to repatriate income taxes on accounts held by citizens of the EU from 2005 could have the citizens consider Singapore to be an alternative major private banking centre.

Switzerland, the world's largest private banking centre, with $2.2 trillion in offshore assets (assets held by EU citizens), could see some of its funds diverted to Singapore.

The EU's Savings Tax Directive rate starts at 15% but will rise to 35% by 2011. All of Europe's other tax havens, not already part of the EU have also fallen in line with the EU's Savings Tax Directive. In Singapore, the funds will be able to compound tax-free.

To date, Singapore has enjoyed only modest success as an offshore banking centre. Offshore assets are estimated at $120 billion, a tenth that of Switzerland's, and most of that is held by overseas Chinese from Southeast Asia. Assets held by EU citizens are easily under 5%.

Over the past five years, Singapore has increased its financial centre profile, with bureaucrats on official trips to Europe holding meetings with private bankers to promote the benefits of the Southeast Asian nation.[841] There is a significant number of major banks and financial institutions which have established a presence in Singapore and the subsequent flow of funds under wealth management in Singapore.

[841] 'Swiss Tax Decision could see Singapore Shine as a Haven' (2003) 8 *Offshore Red: An OFC News Update* 175.

It has been argued that Singapore, with both its judicial and financial platforms in place, has responded to the directives of the supranational bodies and successfully positioned itself to be the compliant jurisdiction of choice for the global wealth management industry.

At the time of submission of this thesis, the OECD report entitled *A Process for Achieving a Global Level Playing Field* was released in June 2004.[842] It would seen that this report is, as stated, a response to the OECD's concern to prevent the migration of business to economies which do not engage in transparency and effective exchange of information for tax purposes. Whilst the subsequent responses and developments from these named "significant financial centres" are not yet available, it does appear to support this thesis, that Singapore is being identified as one of the recipients of the migration of investment funds from Europe. It has positioned itself to be the jurisdiction of choice of global wealth management. However the reason for any influx of foreign funds has yet to be proven by the OECD to be that of a lack of transparency and ineffective exchange of information for tax purposes.

[842] Organisation for Economic Co-operation and Development, above n 833.

APPENDICES

APPENDIX A

MEMBERSHIP OF SUPRANATIONAL ORGANISATIONS

	G8	OECD	FATF	FSF	IMF Percentage of Total Votes
G8					
Canada	X	X	X	X	2.95
France	X	X	X	X	4.97
Germany	X	X	X	X	6.02
Italy	X	X	X	X	3.27
Japan	X	X	X	X	6.16
United Kingdom	X	X	X	X	4.97
United States	X	X	X	X	17.16
OECD					
Australia		X	X	X	1.61
Austria		X	X		0.88
Belgium		X	X		2.14
Czech Republic		X			0.39
Denmark		X	X		0.77
Finland		X	X		0.59
Greece		X	X		0.39
Hungary		X			0.49
Iceland		X	X		0.07
Ireland		X	X		0.4
Korea		X			077
Luxembourg		X	X		0.14
Mexico		X	X		1.2
Netherlands		X	X	X	2.39
New Zealand		X	X		0.42
Norway		X	X		0.79
Poland		X			0.64
Portugal		X	X		0.41
Slovak Republic		X			0.18
Spain		X	X		1.42
Sweden		X	X		1.12
Switzerland		X	X		1.61
Turkey		X	X		0.46

As at 22 April, 2002

	G8	OECD	FATF	FSF	IMF Percentage of Total Votes
Non OECD Member Countries					
Andorra					
Anguilla					
Antigua and Barbuda					0.02
Aruba					
The Bahamas					0.07
Bahrain					0.07
Barbados					0.04
Belize					0.02
Bermuda					
British Virgin Islands					
Cayman Islands					
Cook Islands					
Costa Rica					0.06
Cyprus					0.06
Dominica					0.02
Gibraltar					
Grenada					0.02
Guernsey					
Hong Kong SAR			X	X	
Isle of Man					
Jersey					
Labuan (Malaysia)					
Lebanon					0.11
Liberia					0.04
Liechtenstein					
Macau SAR					
Maldives					0.02
Malta					0.06
Marshall Islands					0.01
Mauritius					0.06
Monaco					
Montserrat					
Nauru					
Netherlands Antilles					
Niue					
Panama					0.11
St Kitts and Nevis					0.02
St Lucia					0.02
St Vincent & the Grenadines					0.02
Samoa					0.02
San Marino					0.02
Seychelles					0.02
Singapore			X	X	0.41
Tonga					0.01
Turks & Caicos					
US Virgin Islands					
Vanuatu					0.02

As at 22 April, 2002

APPENDIX B

PROFESSIONAL FIRMS PARTICIPATING IN BENCHMARKING CHARTS

Stikeman Elliott's London team comprised Richard Hay, Jeffrey Keey, Leigh Nicoll, Robert Reymond and Heather Tibbo.

We gratefully acknowledge the assistance received from leading law firms in the jurisdictions surveyed as part of the benchmarking review. We note that counsel detailed below have reviewed the attached charts. These firms did not review the main report including the case studies. Accordingly, responsibility for errors or omissions, as well as editorial comment, rests with the main authors and contributors. We are grateful for the assistance provided by:

- The Bahamas: Higgs & Johnson, John Delaney
- Bermuda: Appleby Spurling & Kempe, Alison MacKrill
- British Virgin Islands: Harney Westwood & Riegels, Richard Peters
- Canada: Stikeman Elliott, Toronto, Philip Henderson
- Cayman Islands: Maples & Calder, Anthony Travers
- England & Wales/UK re: corporations and limited partnerships: Stikeman Elliott, London, Jeffrey Keey
- England & Wales re: trusts: Allen & Overy, Ceris Gardner
- Hong Kong: Stikeman Elliott, Hong Kong, Clifford Ng
- Isle of Man: Cains, Andrew Corlett
- Jersey: Ogier & Le Masurier, Steven Meiklejohn
- Luxembourg:Le_Goueff@vocats.com, Stéphan Le Goueff
- New Zealand: John Hart, Barrister
- Singapore: Khattar Wong & Partners, Gurbachan Singh
- Switzerland: Lenz & Staehelin, Richard Pease
- USA: Shutts & Bowen, Stephen Gray

APPENDIX C
CORPORATIONS

	Regulation of Service Providers	Bearer Shares	"Corporate" Directors	Requirement For Annual Return	Filing Of Accounts In Corporate Registry	Auditing Of Accounts	Beneficial Ownership Information Available?	Information Exchange (Egmont Group Member)
OECD Countries								
Canada[1]	No	No[2]	No[3]	Yes[4]	Public company – yes Private company – no[5]	Public company – yes Private company – No[6]	Yes[7]	Yes
England & Wales[8]	No[9]	Yes[10]	Yes[11]	Yes[12]	Yes[13]	Yes[14]	No[15]	Yes
Ireland	No[16]	Yes[17]	No[18]	Yes[19]	Yes[20]	Yes[21]	Yes[22]	Yes
Luxembourg 1929 Holding Company[23]	No[24]	Yes[25]	Yes	Yes	Yes[26]	Yes[27]	No[28]	Yes
New Zealand	No[29]	Yes	No[30]	Yes[31]	No[32]	No[33]	No[34]	Yes
Switzerland	No[35]	Yes	No[36]	Yes	No[37]	Yes[38]	No[39]	Yes
U.S. (Delware) (Limited Liability Company)[40]	No[41]	Yes	Not applicable[42]	No	No	No	No[43]	Yes
Non-OECD Countries								
The Bahamas	Yes[44]	No[45]	Yes	Limited company – yes IBC – no	No[46]	Public company – yes IBC – no[47]	Yes[48]	Yes
Bermuda	Yes[49]	No	No	Only for local companies[50]	No[51]	Yes[52]	Yes[53]	Yes
British Virgin Island	Yes[54]	Yes[55]	Yes[56]	Local company – yes IBC – no[57]	Public company – yes Private company – no[58]	Local company public – yes Private company – no[59] IBC – no	No[60]	Yes
Cayman Islands	Yes[61]	Yes, but immobilised[62]	Yes	Yes[63]	Yes[64]	No[65]	Yes[66]	Yes
Hong Kong	No[67]	Yes[68]	Yes[69]	Yes[70]	Public company – yes Private company – no[71]	Yes[72]	No[73]	Yes
Isle of Man	Yes[74]	Yes[75]	No	Yes	Public company – yes Private company – no[76]	Yes[77]	Yes[78]	Yes
Jersey	Yes[79]	No	No[80]	Yes[81]	Public company – yes Private company – no[82]	Public company – yes Private company – no[83]	Yes[84]	Yes
Singapore	No[85]	No	No[86]	Yes	Yes[87]	Yes	No[88]	Yes

CANADA

1 All references are to federal provisions unless otherwise stated.

2 Pursuant to subsection 24(1) of the Canada Business Corporations Act, R.S.C. 1985, as amended ("CBCA"), shares of a corporation must be in registered form. As such, bearer shares are not permitted. However, bearer shares are permitted in Quebec (certificat au porteur) under the Companies Act, R.S.Q., c.C-38, although their use is limited.

3 Paragraph 105(1)(c) of the CBCA indicates that a director of a corporation cannot be a person who is not an individual.

4 All corporations formed pursuant to the CBCA must file an annual return (i.e., Form 22 – Annual Return, CBCA Regulations, Schedule I)

5 In Ontario, corporations whose securities are publicly traded must file audited financial statements with the applicable securities regulatory authorities and also must post their financial statements for public viewing on SEDAR.com (the "System for Electronic Document Retrieval and Analysis"). All companies must file financial statements (not required to be audited) with the applicable income tax authorities.

6 Corporations whose securities are publicly traded are required to have their financial statements audited. Pursuant to subsection 163(1) of the CBCA, shareholders of a private corporation may resolve to not have the corporation's financial statements audited.

7 The directors of a corporation, pursuant to subsection 133(1) of the CBCA, must call an annual meeting of shareholders no later than 15 months after the last preceding annual meeting and no later than 6 months after the end of the corporation's preceding financial year. Solicitation of proxies is mandatory pursuant to s. 149 of the CBCA, unless a corporation has 50 or fewer shareholders and is not a distributing corporation. Pursuant to ss. 57(j) of the CBCA Regulations, a management proxy circular must contain information about the name of each person who, to the knowledge of the directors or officers of the corporation, beneficially owns, directly or indirectly, or exercises control or direction over, shares carrying more than 10% of the votes attached to any class of shares entitled to vote in connection with any matters being proposed for consideration at the meeting. Pursuant s. 235 of the CBCA, the Director of the CBCA may inquire into the ownership and control of a corporation's security in certain circumstances.

ENGLAND & WALES

8 Companies incorporated under the Companies Act 1985, with or without limited liability.

9 Save to the extent the services provided comprise regulated activities for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, in which case the service provider must be authorised by the Financial Services Authority under section 19 of the Financial Services and Markets Act 2000.

10 Section 188 Companies Act 1985 - a company limited by shares may, if authorised by its articles, issue for fully paid shares a share warrant entitling the bearer to the shares specified in it which are transferred by delivery of the warrant.

11 Section 289(2) Companies Act 1985 - corporate directors are permitted, but details of corporate name and registered or principal office must appear in the register of directors required to be maintained by each company. Those details must also be provided within 14 days of appointment to the Registrar of Companies (section 288(2) Companies Act 1985) and are available for public inspection.

12Sections 363(1) and 709 Companies Act 1985 - every company is required to make an annual return to Companies House which is available for public inspection. This confirms information including its registered office and place where its shareholding registers are kept, its type and business activities, details (including names and addresses) of its directors, secretary and shareholders and details of its authorised and issued share capital (sections 364 and 364A Companies Act 1985).

13 Section 242 Companies Act 1985 - certain "small" and "medium-sized" companies are eligible for exemption from the requirement to prepare and file with the Registrar of Companies full audited accounts (Chapter II, Part VII Companies Act 1985). Accounts filed with the Registrar of Companies are available for public inspection (section 704, Companies Act 1985). Unlimited companies need not prepare or file accounts if not a subsidiary of, controlled by or a parent of a limited undertaking (section 254, Companies Act 1985).

14 Part VII Companies Act 1985 - all companies are required to have their accounts audited, save for certain small or dormant companies.

15 There is no legal procedure for compelling disclosure of beneficial interests in shares in a private company or in respect of non-voting shares. However, nominee shareholders must be disclosed, pursuant to a requirement that the name and address of, and class and number of shares held by, each member of a company must be maintained in the statutory register of members maintained by each company (section 352, Companies Act 1985) and shown in the

annual return which every company is required to make. In the case of a nominee shareholding of voting shares in a company incorporated as a public limited company, disclosure of material interests in shares representing more than 3% of the share capital is required (section 198 Companies Act 1985) and the company may also require the identity of a beneficial owner of its shares be disclosed (section 212 Companies Act 1985). Nondisclosure can result in freezing of transfer, voting and distribution rights (section 216 Companies Act 1985).

IRELAND

16 Corporate service providers are not generally regulated, although certain types of service providers are regulated. These include investment companies, insurance intermediaries and credit institutions, insurance companies and mortgage providers.

17 Although permitted, bearer shares are unusual – the general view is that private companies may not issue them without imperiling their private status.

18 Section 176 Companies Act 1963.

19 Sections 125 – 129 Companies Act 1963 – returns must be submitted annually in Companies Registration Office. Mutual funds are exempt.

20 Every company is obliged to submit an annual return to the Registrar of Companies. The annual return must have the following annexed: balance sheet; profit and loss account; director's report and a copy of the auditor's report, where the company is audited. However, small private companies are exempted from the requirement to annex a copy of its profit and loss account and the director's report to the return but must provide an abridged balance sheet. A medium sized company is required to give an abridged balance sheet and short-form profit and loss account.

21 Section 160 Companies Act 1963 - all companies, with a de minimis exception for small private companies, are required to appoint an auditor. Companies are generally obliged by law to submit their accounts at least once a year for scrutiny by an independent professional auditor. A non-charitable company can be exempted from the requirement to have an annual audit provided that it complies with certain conditions which are set out in Part III of the Companies (Amendment) (No. 2) Act 1999.

22 A list of shareholders must be contained in the annual return. In the case of a nominee shareholder there are certain disclosure rules concerning beneficial ownership where the beneficial owner attains a 5% or greater interest in the voting capital in a public company. In the case of private companies certain interested parties may apply to the court for an order compelling disclosure of beneficial ownership, but there is no general obligation of disclosure for this type of company.

LUXEMBOURG 1929 HOLDING COMPANY

23 Luxembourg holding companies are usually incorporated as a *société anonyme* which permits shareholders to retain a high level of confidentiality through the use of bearer shares. Due to the overwhelming recourse to the *société anonyme* form for holding companies, only this form of incorporation will be discussed herein. A holding company can also be incorporated under the form of a S.a.r.l., A Senc, an Seca, or a Sc.

24 There is no specific organisation for the regulation of service providers.

25 Once the shares are fully paid up, and provided that there is no provision to the contrary in the articles of association, the shares of a Luxembourg company may be in bearer form (and so transferable by the physical transfer of the related certificates).

26 1929 holding companies are obliged to file and publish abridged annual accounts.

27 The commercial company law provides that companies are obliged to use the services of a *"reviseur d' enterprises"* (i.e., an independent auditor) for the control of their accounts if two of the following criteria are met: a total balance sheet is in excess of EUR 2,305,410; the net turnover of the company exceeds EUR 4,610,820; the number of personal employed full time during the fiscal year exceeds 50 employees.

28 No disclosure of the beneficial owner to the authorities is required.

NEW ZEALAND

29 The Registrar of Companies is responsible for administration of the Companies Act 1993, though, there is no regulation of corporate service providers.

30 Section 51 Companies Act 1993.

31 Section 208 and 214 Companies Act 1993. See also the 4th Schedule, Companies Act 1993 "Information to be contained in Annual Return".

32 While there is a requirement to file an annual return with the Registrar of Companies, this only involves very basic information concerning the identity and addresses of the directors and shareholders, and the existence of any changes. There is no obligation to file accounts, except in relation to "non exempt" companies. These are companies which have 25% or more foreign

shareholding as described in footnote 35. In other words, there is both an account filing and audit requirement for such non-exempt companies. Those companies which have taxable income are required to file an abridged summary of income/expenses etc to enable computation of the income tax liability to the tax authorities.
33 Section 196 Companies Act 1993 - an appointment of an auditor is normally required but some companies may unanimously resolve not to appoint an auditor. (This exception does not apply to a subsidiary of a company or body corporate incorporated outside of New Zealand or New Zealand companies owned as to 25% or more by an overseas entity or to "issuers" within the meaning of Section 4 of the Financial Reporting Act 1993.
34 Section 87 Companies Act 1993 - every company must keep a register of its shareholders. Shareholder information must be filed with the Registrar of Companies on an annual basis. There is no requirement to disclose beneficial ownership where parties are holding shares as nominees, except in relation to listed companies.

SWITZERLAND
35 Corporate service providers are not generally regulated, although the Federal Banking Commission acts as the supervisory authority for the entities that are subject to the Federal Law on Banks or that are securities dealers under the Federal Stock Exchange Act. Corporations used as investment vehicles and which do not fall within the above categories are not subject to any specific supervision.
36 Corporations may however be represented by nominee directors. A majority of the directors must be Swiss nationals.
37 No requirement to file accounts with any registry, but banks, deposit-taking finance companies etc must fulfil special filing requirements. Accounts, must however, be filed with the federal tax administration not later than seven months after the end of the company's accounting period.
38 Auditing is required for Swiss corporations (« Aktiengesellschaft » / « société anonyme »). Auditing is not required for other forms of companies, e.g. limited liability companies (« Gesellschaft mit beschränkter Haftung » / « Société à responsabilité limitée »).
39 The Trade Registry contains no information as to the shareholders / beneficial owners of a corporation. In the case of a limited liability company, the Trade Registry discloses the identity of the holders of the shares in the limited liability company. There is however no requirement that the holder of the share be the ultimate beneficial owner. Should a corporation open a bank account, the bank must comply with the Swiss Know Your Customer rules which imply the identification of the beneficial owner for example whenever the accountholder is a company with no commercial activities of its own, i.e. a domiciliary company.

U.S. (DELAWARE)
40 A limited liability company, commonly referred to as an "LLC" is an entity which has characteristics of both a corporation and a partnership. It is similar to a partnership as the LLC is not a separate taxable entity and also like a corporation in that all LLC owners are protected from personal liability for business debts and claims.
41 Corporate service providers/administrators are neither licensed nor regulated.
42 There is no distinction between shareholders and directors since management of the company is vested in the members of the company.
43 LLCs are not required to disclose beneficial ownership. There is no administrative procedure for compelling a nominee to disclose the identity of the beneficial owner.

THE BAHAMAS
44 An international business company (IBC) may only be incorporated by licensed bank and trust companies and licensed financial and corporate service providers. An IBC incorporated by a licensed bank or trust company is regulated by the Inspector of Banks and Trust Companies and an IBC incorporated by a licensed financial and corporate service provider is regulated by the Inspector of Financial and Corporate Services. Furthermore, The Bahamas Compliance Commission, under the Financial Transactions Reporting Act, is responsible for the regulation of financial institutions which includes banks and trust companies licensed under the Banks and Trust Companies Regulation Act 2000.
45 An IBC may issue registered shares but not shares issued to bearer (section 10(a) International Business Companies Act 2000). An IBC shall keep a share register at its registered office which contains such information as the names and addresses of persons who hold registered shares in the company, the number of shares of each class and series of registered shares held by each person and the date the name of each person was entered in the share register.
46 Companies are not required to file accounts with the Companies Registry. However, in the case of a public company, the Registrar may, at any time, request in writing a copy of the annual

financial returns. Furthermore, public companies, banks and insurance companies (subject to de minimis exceptions), must file accounts with the relevant authorities.
47 Public companies are obliged to have accounts audited – sections 123-128 Companies Act 1992. Financial statements of an IBC are not required to be audited unless required by the IBC's Articles of Association. IBCs are not required to appoint an auditor and members of a private company may resolve not to appoint an auditor (section 130 Companies Act 1992).
48 There is no legal requirement to publicly file the list of shareholders for an IBC. Other companies are required to include a list of shareholders in their annual return. There is no legal procedure for compelling a nominee holding shares in any company to disclose identity of the beneficial owner except where money laundering is suspected. A company licensed under the Financial and Corporate Service Providers Act 2000 ("FCSPA") must keep a record in respect of each client, including the name and address of the beneficial owners of all IBCs incorporated and or existing under the International Business Companies Act 2000 (section 14(3) FCSPA).

BERMUDA
49 Service providers are regulated by the Bermuda Monetary Authority and the Bermuda Registrar of Companies.
50 However, exempted companies must provide an annual Declaration of Business confirming the assessabla capital and business of that company.
51 However, insurance companies are required to file audited financials and a financial return annually with the Bermuda Monetary Authority.
52 Companies are required to appoint auditors and accountants, but the appointment of an auditor and the laying of audited financial statements before a company in general meeting can be waived. However, if the production of audited financial statements is waived, a company must still maintain accounts sufficient for the directors and resident representative of that company to ascertain with reasonable accuracy the financial position of a company in any 3 month period.
53 Every company is required to keep a register of its shareholders which is open to inspection by the public. Every person that intends to hold 5% or mora of the authorised share capital of a company must provide certain further information to the Bermuda Monetary Authority, whose consent is required to issue or transfer shares to any person who will hold 5% or more of a company's authorised share capital. There is no disclosure of the beneficial ownership of a proposed shareholdar of a Bermuda company in the case of companies whosa shares are listed on an Appointed Stock Exchange (as are prescribed by the Ministar of Finance). Nominee shareholding is permitted however disclosure of the beneficial owner to the Bermuda Monetary Authority is required on a confidential basis, however the Bermuda Monetary Authority and, in the case of insurance companies, the Insurance Division of the Registrar of Companies may disclose information to a regulator with similar responsibilities if there is reciprocity.

BRITISH VIRGIN ISLANDS
54 In January 2002, the government established the Financial Services Commission, an independent body which is responsible for supervision of corporate service providers. However, the Financial Services Commission is not yet responsible for regulating investment business.
55 Government has made a public commitment to amend tha International Business Companies (IBC) Act to "immobilize" bearer shares. The process of immobilization is under consideration. Bearer shares are not permitted for companies carrying on certain regulated activities in the BVI.
56 Non-BVI corporate directors are not permitted for managers or administrators licensed under the Mutual Funds Act, 1996.
57 Public companies incorporated under the Companies Act must submit an annual audited balance sheet to the Registrar of Companies, banks, trust companies and management companies must submit annual audited accounts to the Head of Banking and Fiduciary at the Financial Services Commission; public funds registered under the Mutual Funds Act 1996 must keep annual audited financial statements and insurance companies must submit to the Insurance Supervisor annual audited accounts. Government has made a public commitment to amend the IBC Act to require names and addresses of directors of IBCs to be filed at the Registry of Companies.
58 Public companies under the local Companies Act must file audited financial statements with the Registrar of Companies. Private companies are not required to file accounts of any type with the Registrar of Companies. However, companies incorporated under the local Companies Act must file an income tax return which would almost always be supported by financial statements.
59 Public companies, banks and trust companies, insurance companies, public mutual funds and company management companies and mutual funds managers and administrators are required to appoint auditors. Public companies must fila an auditor's report on annual accounts.

60 On establishment the Memorandum of Association which includes names, addresses and descriptions of subscribers must be delivered to the Registrar of Companies. Local companies are required to submit shareholder information in their annual return. Discovery of the identity of the beneficial owner of a nominee shareholding is achieved by application of evidence rules generally in criminal and civil matters. The Anti-Money Laundering Code of Practice requires registered agents of IBCs to maintain records of identity in respect of new clients, except in circumstances where the client has been introduced by a similarly regulated entity from another jurisdiction. These records need not be retained in the BVI as long as they are available on request of the registered agent.

CAYMAN ISLANDS
61 Service Providers are regulated by the Cayman Monetary Authority.
62 Bearer shares are not permitted unless they are subject to custodial arrangements with a recognised international custodian or licensed Cayman Islands entity.
63 An annual return must be filed for every company with the Registrar of Companies in prescribed form.
64 Regulated entities must file accounts. No requirement to file accounts with the Registrar of Companies but banks, trust companies, mutual funds, mutual funds administrators, insurance companies and company management companies must prepare and file audited financial statements and reports in accordance with the relevant laws and any special terms and conditions imposed by the Cayman Islands Monetary Authority at the time of the granting of each individual licence. Financial statements must be maintained by all companies but only the entities designated must file audited financial statements with the Cayman Island Monetary Authority.
65 Company financial statements must be prepared but need not be audited.
66 On incorporation the Memorandum of Association which includes the names and addresses of subscribers must be delivered to the Registrar of Companies. The records are not available for public inspection. The Money Laundering Regulations and Guidance Notes contain specific provisions dealing with the obligation of any financial service provider to obtain specified details on the beneficial owners. This information is available to the Cayman Island Monetary Authority.

HONG KONG
67 However, banks, restricted licenced banks and deposit-taking companies are regulated by the Hong Kong Monetary Authority and securities dealers, investment advisors, commodity dealers and securities margin financiers, together with investment products are regulated by the Securities and Futures Commission.
68 A company may issue warrants to bearer if so authorised by its articles.
69 However, corporate directors are not permitted in the case of a public company or a private company which is a member of a group of companies including a listed company.
70 Submitted annually to the Registrar of Companies.
71 Public companies are required to file financial accounts with the Companies Registrar (as part of the company's annual information return) and with the Inland Revenue Department (as part of the company's profit tax return). Private companies are not required to file financial accounts with the Companies Registrar but are required to file financial accounts with the Inland Revenue Department (as part of the company's profit tax return).
72All companies are required to have their financial statements audited by a certified public accounting firm in Hong Kong.
73 The registers of members of both public and private companies are available for inspection by members and any other person at the registered office of the company. The register shows the registered owner, not the beneficial owner. There is no legal procedure for compelling a nominee holding shares in a private company to disclose the identity of the beneficial owner. For listed companies, disclosure is required if the beneficial owner is a director of the company or a substantial shareholder. There is no specific provision in any other legislation regarding identifying the beneficial owner of shares but the courts have a general power to make orders against a person in a specific case and there are investigative orders that may be granted by a court in the case of the investigation of organised and serious crime.

ISLE OF MAN
74 Under the Corporate Service Providers Act 2000, only those licensed as corporate service providers (CSPs) by the Financial Supervision Commission are now permitted to incorporate and administer companies. The Commission is also responsible for the regulation and supervision of CSPs.
75 Warrants to bearer are permitted but as part of the Isle of Man's OECD commitment the legislation permitting warrants to bearer will be repealed.

76 Only public companies are required to deliver accounts to the Companies Registry. However, as part of the Isle of Man's OECD commitment, a company will either have to file accounts with the taxation authorities or prepare audited accounts which must be available for production to the taxation authorities on request.
77 An audit is required unless the company is private and is either dormant or tax exempt pursuant to, principally, the Income Tax (Exempt Companies) Act 1984 and all its members have passed a resolution to dispense with the appointment of an auditor. This audit exemption is currently under review as part of the Isle of Man's OECD commitment.
78 The name and address of, and class and number of shares held by each member of a limited company must be shown in the annual return. The beneficial owners of companies are required to be known to and verified by the relevant corporate service provider and available on request to the Commission as part of its compliance procedures function or be produced to third parties by court order.

JERSEY
79 Service providers are regulated by the Jersey Financial Services Commission.
80 Article 73(2)(d) Companies (Jersey) Law 1991.
81 Article 71 Companies (Jersey) Law 1991.
82 Article 106 Companies (Jersey) Law 1991 - accounts for public companies must be filed with the Registrar of Companies and are open for public inspection. There are no requirements for private companies to file financial accounts with any central registry nor to submit accounts to any local tax authority.
83 Public companies are required to prepare and file audited accounts annually. Article 109(1) and 110 Companies (Jersey) Law 1991- a private company only need prepare an audit if the articles of the company so require or if a resolution in a general meeting so requires.
84 All companies must disclose beneficial ownership information to the Jersey Financial Services Commission (JFSC) on incorporation. In the case of an exempt company or an IBC, any changes in beneficial ownership must be reported to the JFSC when it occurs. (Control of Borrowing (Jersey) Order 1958).

SINGAPORE
85 There is no specific organisation which regulates corporate service providers in their capacity as such. However, corporate service providers (lawyers and accountants) are regulated by their respective professional bodies. The Monetary Authority of Singapore supervises the banking, insurance, securities and futures industries.
86 Section 145 Companies Act Chapter 50, 1994 Revised Edition.
87 Annual accounts must be filed with the Registry of Companies and Business. However, "private exempt companies", which are defined as a company, with less than 20 shareholders all of whom are individuals are permitted to file a directors' report and accounts with the registrar.
88 The name, and address of, and class and number of shares held by, each member of a limited company must be shown in the annual return. No administrative procedure exists for compelling a nominee holding shares in a private company (or non-voting shares in a publicly listed company) to disclose the identity of the beneficial owner. A substantial shareholder has the obligation to state whether he holds voting shares as beneficial owner or otherwise.

As at 24 June 2002
Stikeman Elliott 2002

APPENDIX D
TRUSTS

	Licensed Or Regulated Trustees	Central Registry For Constituting Documents	Requirement To File Financial Statements	Requirement To Audit Financial Statements	Settlor And Beneficiary Information Available Or Filed	Exchange Of Information – Member Of The Egmont Group
OECD Countries						
Canada (Ontario)[1]	Yes[2]	No	No	No	Yes[3]	Yes
England & Wales[3]	No[4]	No[5]	No[6]	No[7]	Yes[8]	Yes
Ireland	No[9]	No	No	No	No[10]	Yes
New Zealand	No[11]	No	No	No	Yes[12]	Yes
Switzerland	No	No	No	No	Yes[13]	Yes
U.S. (Delware) (Limited Liability Company)[40]	No[14]	No[15]	No	No	No[16]	Yes
Non-OECD Countries						
The Bahamas	Yes[17]	No[18]	No	No	Yes[19]	Yes
Bermuda	Yes[20]	No	No	No	Yes[21]	Yes
British Virgin Island	Yes[22]	No[23]	No	No	Yes[24]	Yes
Cayman Islands	Yes[25]	No	No[26]	No	Yes[27]	Yes
Hong Kong	No[28]	No	No	No	Yes[29]	Yes
Isle of Man	No[30]	No[31]	No[32]	No[33]	Yes[34]	Yes
Jersey	Yes[35]	No	No	No	Yes[36]	Yes
Singapore	Yes[37]	No[38]	No	No	Yes[39]	Yes

1 ie can be elicited through an administrative as opposed to judicial process

CANADA

2 The *Loan and Trust Corporations Act* (Ontario) ("LTCA"), R.S.O. 1990, c. L-25 regulates loan and trust corporations carrying on business in Ontario.

3 The LTCA does not contain any requirement to file settlor and beneficiary information with the Superintendent (who is appointed under the *Financial Services Commission of Ontario Act, 1997*). However, the *Proceeds of Crime (Money Laundering) Act*, 1991, c. 26, establishes strict record-keeping requirements including for banks and trust corporations and the identity of potential clients. New record-keeping requirements are expected to be implemented in 2002 pursuant to the regulations under the new legislation entitled the *Proceeds of Crime (Money Laundering) Act and Terrorist Financing Act, 2000*, c. 17.

ENGLAND & WALES

4 Trust companies (which must be distinguished from "trust corporations" which have a statutory definition and are required to comply with specific statutory conditiond) are not regulated (other than having to comply with the Companies Act or Charities Acts (if appropriate)). The Financial Services and Markets Act 2000 (the "Act") will apply if such a company is concerned with making or trading in investments or giving investment advice. However, subject to any contrary indication in the trust instrument, trustees have statutory powers to invest funds as if they were absolutely entitled to the trust assets and thus should not be within the terms of the Act.

5 There is no central registry for trusts although certain information must be provided to Companies House and to the Charity Commission in respect of charitable trusts.

6 Other than the submission of annual tax returns to the Inland Revenue, there is no requirement for trustees to file financial statmenets. Subject to certain exceptions, charities are required to file their annual accounts with the Charity Commission.

7 There is no requirement to audit financial statements, save that charities with an annual income of at least £250,000 are obliged to have their accounts audited.

8 On the creation of atrust, trustees are required to submit a Form 41G (Trust) to the Inland Revenue which requires information about the trustees, the settlor and the assets settled. Certain other events, depending on the type of trust, will also prompt a requirement for further forms to be completed. Money laundering laws apply to trustees and advisers. The laws require client identification procedures to be adopted and information retained on file.

IRELAND

9 Trust companies are regulated by the Central Bank of Ireland only in the context of mutual finds.

10 The trustees of private trusts do not have to identify the settlors and all the beneficiaries of either existing or new trusts. Any relevant information is kept by the trustees on file as there is no regulatory register.

NEW ZEALAND

11 There is no regulation of trust companies, although there is regulation in relation to trusteeship of deceased estates and the performance of a "statutory supervisor" function under the Securities Act 1978 which broadly relates to trusteeship/supervision of publicly offered securities.

12 Pursuant to the Financial Transactions Reporting Act 1996, financial institutions, which include any person "whose business consists of acting as trustee in respect of funds of other persons" have imposed on them obligations, which include the verification of the identity of persons. There is no disclosure or central filing obligation as such; just a requirement to make inquiries and hold materials on file.

SWITZERLAND

13 A Swiss trustee qualifies as a financial intermediary under the Swiss Money Laundering Act ("MLA") and is subject to the applicable supervision (official authority or self-regulating body). Information about the settlor and beneficiary must be known by the trustees and kept on file pursuant to the MLA, however this does not need to be filed with any central registry nor is it publicly available. However, should the trustee open a bank account, the bank will be obliged to identify the settlor and beneficial owner under the applicable know your customer rules.

U.S. (DELAWARE)

14 There is no requirement that a trustee be licensed and there is no regulation as such (individuals can be trustees). The trustee must have a Delaware address.

15 Business trusts have the opportunity to register a certificate of trust, but it is not required.

16 The identities of the settlor and beneficiaries need not be disclosed.

THE BAHAMAS

17 Trust companies conducting business in The Bahamas have been required to be licensed since 1962. The Banks and Trust Companies Regulation Act, 2000 ("BTCRA") expands these provisions.
18 Section 94 of the Trustee Act provides that "Notwithstanding any provisions of the Registration of Records Act, any deed creating a trust, all deeds of appointment made pursuant to the terms of a trust and all other deeds (but not including conveyances of Bahamian real property or personalty) executed by the trustees, settlors, beneficiaries or protectors of a trust pursuant to the powers and discretions specified in the trust instrument, are exempt from registration under the provisions of the Registration of Records Act."
19 Pursuant to the Financial Transactions Reporting Act, 2000 ("FTRA") and the Financial Transactions Reporting Regulations, 2000 ("FTRR"), a financial institution (inclusive of a bank or trust company licensed under the BTCRA) is required to verify the identity of both existing and new facility holders (including the beneficial owner of the facility (if different from the facility holder)). In the case of a trust, the settlor's identity must be verified as a facility holder. A financial institution is also required to verify the identity of beneficiaries of a trust with a vested interest. There is no requirement to verify the identity of potential beneficiaries ie persons who do not have a vested interest. Identification verification information must be retained by a financial institution for a minimum period of 5 years after the end of the relationship with a facility holder (section 24 FTRA).

BERMUDA

20 The Trusts (Regulation of Trust Business) Act 2001 requires that persons carrying on trust business in or from within Bermuda are licensed undertakings. Private trust companies which have been incorporated specifically to act as trustees for private family trusts or a group of related trusts are not regulated by the Act.
21 Trustees are regulated under two separate areas of legislation; the proceeds of crime legislation (The Proceeds of Crime Act 1997, the Proceeds of Crime (Money Laundering) Regulations 1998 and the Guidance Notes on the Prevention of Money Laundering) and the trusts regulation legislation (the Trusts (Regulation of Trust Business) Act 2001 (now in force) and the Statement of Principles and Code of Practice thereunder (expected to be in force later 2002)). Under the former, verification of the settlor and, where appropriate, the principal beneficiaries, is required. This information is held on file. Although there were grandfathering provisions, any addition to the trust fund will trigger the verification procedure so in most cases verification has occurred even if the trust was an existing trust in 1997. Under the latter, the Code provides that the trustees must be able to satisfy the proceeds of crime legislation and, in addition, they are required to have adequate information relating to the beneficiaries (identity and their needs) so that the trustees are in a position to carry out their responsibilities and fiduciary obligations.

BRITISH VIRGIN ISLANDS

22 The Banks and Trust Companies Act, 1990 requires all trust companies (no matter where they are incorporated) which carry on "trust business" within the BVI and all BVI-incorporated companies carrying on trust business (whether in the Territory or outside the Territory) to be licensed under that Act. Foreign incorporated trust companies operating in the BVI, which are in the business of providing trustee or other specified services must also be licensed under the Banks and Trust Companies Act 1990.
23 The Trustee (Amendment) Act 1993 exempts all deeds creating trusts, all deeds of appointment pursuant to the terms of a trust and all other deeds executed by trustees, settlers and beneficiaries pursuant to the powers and discretions in the instrument creating the trust, from registration and filing save for trust deeds relating to unit trusts which are public funds under the Mutual Funds Act, 1996.
24 Records of identity of new clients must be maintained by registered agents and other registered entities pursuant to the Anti-Money Laundering Code of Practice, save where the client has been introduced by a similarly regulated entity in another jurisdiction. Provided that the BVI trustee is satisfied the records are maintained and are readily accessible, there is no requirement for them to be kept within the BVI. Thus the BVI trustee will have information about the settlor available on file. Information about the beneficiaries is not required by statute, but for best practice, BVI trustees should maintain this.

CAYMAN ISLANDS

25 All companies acting as trustees must be licensed and regulated under The Banks and Trust Companies Law.

26 There are no public filing requirements for inter vivos trusts, unless the trust is to be registered as an exempted trust.

27 As a matter of trust law the trustees are under an obligation to know the identities of the settlor and beneficiaries. Furthermore, verification of the identity of the settlor and all due diligence with regard to source of funds is required by the Money Laundering Regulations (and as further detailed in the guidance notes), which are of necessary application to all licensed trust companies in the Cayman Islands.

HONG KONG

28 A Hong Kong incorporated company may apply to be registered as a trust company by the Registrar of Companies under the Trustee Ordinance (Section 77(1)). Registered trust companies and trustees are subject to the provisions of the Trustee Ordinance. A company that is not registered as a trust company can act as trustee and may not be subject to regulation (unless it is regulated as a bank, insurance company, securities dealer, etc. under another law). However, a company cannot act as executor of a will, apply for probate or letters of administration, nor be appointed by a court as a trustee, unless it is registered as a trust company.

29 Trustees of private trusts do not have to identify the settlors and beneficiaries of a trust (absent a court order) pursuant to any statutory provisions. However, as a matter of trust law the trustees will need to identify the settlor and beneficiaries. The information would be kept only on the trustee's file.

ISLE OF MAN

30 Providers of administration services to companies are regulated under the Corporate Service Providers Act 2000. There is no equivalent legislation for trustees, although the Isle of Man Government has announced its intention to introduce such legislation in the short term.

31There is no central registry for constituting documents, but charitable purpose trusts are required under the Charities Registration Act 1989 to register with the Charities Registry.

32 There is no requirement to file financial statements, save that charitable purpose trusts are required to file audited financial statements.

33 There is no requirement to audit financial statements, save that charitable purpose trusts are required to file audited financial statements.

34 Under the anti-money laundering know your customer requirements, a trustee must know and verify the identities of the real settlor, the protector (if any) and to the extent possible under the form of trust, the beneficiaries. In addition, the trustee has to satisfy himself as to the source of funds forming the corpus of the trust and the underlying identity of all those who have remitted such funds.

JERSEY

35 The Financial Services (Jersey) Law 1998 regulates the carrying on of "trust company business" both in or from within the Island and if carried out by a company incorporated in the Island, anywhere in the world.

36 A Jersey trustee of a Jersey law trust will know the identities of the settlor and beneficiaries of the trust.

SINGAPORE

37 Service providers are regulated pursuant to the Trust Companies Act (1985).

38 Private trusts are not required to be registered. The Charities Act provides for mandatory registration with the Commissioner of Charities of charitable trusts established in Singapore.

39 Apart from income tax returns on distributions of income or deemed income and company law requirements as to substantial shareholders, there is no requirement by the trustees to register or file information on the settlor or beneficiaries of a trust. In addition, at present, trustees of private trusts do not have to identify the settlors and all the beneficiaries of both existing and new trusts under any statute. As a matter of general trust law however, the trustee will have to identify the settlor and beneficiaries.

As at 18 June 2002

Stikeman Elliott 2002

APPENDIX E
LIMITED PARTNERSHIPS

	Registration Of Partnership On Establishment	Requirement For Local Partner	Requirement For Registered Office In Jurisdiction	Annual Reporting Requirements	Filing Of Accounts In Central Registry	Auditing Of Accounts	Filing Of Ownership Information	Information Exchange (Egmont Group Member)
OECD Countries								
Canada (Ontario)	Yes[1]	No	No[2]	No	No[3]	No[4]	Yes[5]	Yes
Ireland	Yes[6]	No	Yes[7]	No	No[8]	No[9]	Yes[10]	Yes
Luxembourg[11]	Yes	No	Yes	Yes	No[12]	Yes[13]	General partner – yes[14] Limited partner – no	Yes
New Zealand (Special Partnership[15])	Yes[16]	Generally not required	Yes	No	No[17]	No	Yes[18]	Yes
Switzerland	The legal form of a limited partnership is available but very rarely used.							
United Kingdom[19]	Yes[20]	No	Yes[21]	No	No[22]	No	Yes[23]	Yes
U.S. (Delware)	Yes[24]	Yes	No[25]	No	No	Only for public limited partnerships	General partner – yes Limited partner – no[26]	Yes
Non-OECD Countries								
The Bahamas (Exempted Limited Partnership)	Yes[27]	Yes[28]	Yes[29]	Yes[30]	No	No	General partner – yes Limited partner – no[31]	Yes
Bermuda (Exempted Limited Partnership)	Yes[32]	No[33]	Yes[34]	Yes[35]	No	No[36]	General partner – yes Limited partner – no[37]	Yes
British Virgin Island (International Limited Partnership)	Yes[38]	No[39]	Yes[40]	No	No[41]	No[42]	General partner – yes Limited partner – no[43]	Yes
Cayman Islands (Exempted Limited Partnership)	Yes[44]	Yes[45]	Yes[46]	Yes[47]	No	No	General partner – yes Limited partner – no[48]	Yes
Hong Kong	Yes[49]	No	No[50]	No	No[51]	No	Yes[52]	Yes
Isle of Man	Yes[53]	No[54]	Yes[55]	Yes[56]	No[57]	No	Yes[58]	Yes
Jersey	Yes[59]	Generally not required	Yes[60]	No	No[61]	No[62]	General partner – yes Limited partner – no[63]	Yes
Singapore	Limited partnership not available.							

* For the purposes of this exercise, only limited partnerships have been reviewed. This does not include limited liability partnerships.

CANADA (ONTARIO)

1 Under the *Limited Partnership Act* (Ontario) ("LPA"), R.S.O. 1990, c. L-16, as amended, and regulations made under the LPA ("LPA Regulations"), a written declaration signed by all of the general partners must be filed with the registrar appointed under the *Business Names Act*, R.S.O. 1990, c. B-17 ("BNA"). The general partner will be deemed to be carrying on business in Ontario through the limited partnership. Pursuant to the LPA Regulations, included among the prescribed information to be filed with the registrar is a statement of a partner's contribution to the limited partnership and the general nature of the business. A record of limited partners, pursuant to ss. 4(1) of the LPA, must be kept at the limited partnership's principal place of business in Ontario. No person associated in a limited partnership may carry on business or identify himself or herself to the public unless the name of the partnership has been registered by all partners or by a designated partner under the LPA.
2 However, pursuant to subsection 33(1) of the LPA, every limited partnership shall keep certain information at its principal place of business in Ontario, including a copy of the partnership agreement, a copy of the declaration and a copy of each declaration of change amending the declaration. Pursuant to subsection. 33(2) of the LPA, where an extra-provincial limited partnership ("EPLP") does not have a principal place of business in Ontario, the documents referred to in the foregoing sentence shall be kept by the EPLP's attorney and representative in Ontario.
3 Financial statements of the limited partnership are not required to be filed with the registrar.
However, such information is required to be submitted to the applicable income tax authorities.
4 Although a limited partnership's financial information would not normally be audited, the general partner's financials might be.
5 Ownership information of a limited partnership must be filed with the registrar pursuant to the regulations made under the LPA. Pursuant to subsection 19(2) of the LPA, a declaration of change must be filed for the admission of a new general partner, but not for a new limited partner (also see section 17 of the LPA). As stated above, however, a record of limited partners must be kept at the limited partnership's principal place of business in Ontario.

IRELAND

6 Section 5 of the Limited Partnership Act 1907 – a statement signed by all the partners which includes the full name of the partners must be sent to the Registrar of Companies.
7 Section 8 Limited Partnership Act 1907 – principal place of business must be in the Republic of Ireland.
8 It is not necessary to file financial accounts as at least one general partner has unlimited liability for the liabilities of the partnership. However, if all of the partners effectively have limited liability, then regulation 6 of the European Community (Accounts) Regulation 1993 applies and accounts must be filed. Furthermore, a limited partnership is required to file tax returns with the Irish Revenue Commissioners and the Revenue Commissioners look for financial statements to support tax computations.
9 However, with regards to Investment Limited Partnerships, the Central Bank is the regulator and may require audits of the partnership.
10 Registration of Business Names Act 1963 - a full list of partners must be filed with the Registrar of Companies on establishment and when changes occur.

LUXEMBOURG

11 We have reviewed the ordinary limited partnership (i.e., *le Société en Commandite Simple*).
12 Except for limited partnerships where all their general partners are financing companies.
13 The commercial company law provides that companies are obliged to use the services of a *"reviseur d' entorprises"* (i.e., an independent auditor) for the control of their accounts if two of the following criteria are met: a total balance sheet is in excess of EUR 2,305,410; the net turnover of the company exceeds EUR 4,610,820; the number of personal employed full time during the fiscal year exceeds 50 employees.
14 The commercial company law provides that a limited partnership must be formed under a business name which must comprise the name of one or more general partners. In addition, general partners' names must be filed on establishment and when changes occur. There are no such requirements for limited partners.

NEW ZEALAND (SPECIAL PARTNERSHIP)

15 Section 50 Partnership Act 1908 – "[a] partnership may consist of general partners, who shall be jointly and severally responsible as general partners ... [and] special [limited] partners, who shall contribute to the common stock specific sums in money as capital, beyond which they shall not be responsible for any debt of the partnership" except in certain cases.

16 Section 51 Partnership Act 1908 – all the partners must sign a certificate containing the information set out in Section 51 which includes the names and addresses of all the partners. This certificate must be acknowledged by each partner before a Justice of the Peace and registered in the office of the High Court of New Zealand (Section 54).

17 Limited partnerships are not required to file financial accounts with any central registry. However, the income of a partnership and the partners' shares in the partnership are disclosed to the Commissioner of Inland Revenue in a joint return. This information is confidential to the Commissioner.

18 Partners' names and home addresses are filed at the High Court Registry on formation. It is common practice for changes of limited partners to be dealt with by way of contract, utilising a so called "deed of accession". There is no strict statutory requirement for such changes of ownership to be recorded in the High Court, although this would usually occur at the time of renewal of a special partnership after the expiry of its initial term (which has a maximum term of 7 years). Accordingly, the public record may not be current in identifying beneficial owners.

UNITED KINGDOM

19 Limited partnerships formed under the Limited Partnership Act 1907 (the "LPA") but not limited liability partnerships formed under the Limited Liability Partnership Act 2000.

20 Section 8 of the LPA - a statement as to the firm's name, business, principal place of business, partners, terms and date of commencement and contribution of the limited partners must be filed with the Registrar of Companies in that part of the U.K. in which the firm's principal place of business is situated. Failure renders the firm a general partnership (section 5 of the LPA). Statements so filed are available for public inspection (section 16 of the LPA).

21 Section 8 of the LPA – the principal place of business must be situated or proposed to be situated in the United Kingdom.

22 However, when the firm is within the scope of the Partnerships and Unlimited (Accounts) Regulations 1993 because each of its members is a limited company or an unlimited company, or a Scots firm, each of whose members is a limited company (wherever those entities are formed) the local corporate partner must under those Regulations append the partnership return to its own return– unless the firm is consolidated in group accounts prepared by an EU member state member (or parent of such member).

23 Sections 8 and 9 of the LPA - all of the partners' names, the contributions of limited partners and whether in cash or otherwise must be filed with the relevant Registrar of Companies on establishment of the partnership and within 7 days of any changes.

U.S. (DELAWARE)

24 A certificate of limited partnership must be filed with the Delaware Secretary of State.

25 There is a requirement of a local registered agent. There is no requirement of a local place of business.

26 For all limited partnerships, the certificate of partnership, which lists the general partners only, is a public record. The identities of limited partners are not disclosed or public.

THE BAHAMAS (EXEMPTED LIMITED PARTNERSHIP)

27 Section 9, Exempted Limited Partnerships Act 1995 (the "ELPA") - a statement signed by or on behalf of the general partners which includes the general nature of the business, the address in The Bahamas of the registered office of the exempted limited partnership and the full name and address of each of the general partners must be filed with the Registrar of Exempted Limited Partnerships.

28 At least one general partner must be a Bahamian resident, an international business company existing under the International Business Companies Act 2000, a company incorporated under the Companies Act 1992 or a foreign company registered in The Bahamas under the Companies Act 1992.

29 Section 6(4) of the ELPA - exempted limited partnerships must have a registered office in The Bahamas for the service of process and delivery of notices and other communications.

30 Section 19(1) of the ELPA - an exempted limited partnership is required to file an annual return with the Companies Registry. Section 10(1) of the ELPA - additionally, any changes in the registered

particulars of the statement of the exempted limited partnership must also be filed at the Companies Registry.
31 The names and addresses of each general partner must be filed with the Registrar on establishment of the partnership and the information must be updated if any changes occur. Further, pursuant to section 14(3) of the Financial and Corporate Service Providers Act 2000 (the "FCSPA"), a company licensed under the FCSPA should keep a record in respect of each client, including the name and address of all partners registered under the ELPA.

BERMUDA (EXEMPTED LIMITED PARTNERSHIP)
32 Certificate of Particulars of Limited Partnership, Certificate of Particulars of Exempted Partnership together with fully executed partnership articles, must be filed with the Registrar of Companies. (n.b. when articles of partnership are amended the revised articles are not required to be registered.)
33 However, section 17 of the Exempted Partnerships Act 1992 (as amended 1999) (the "EPA") - an exempted partnership shall maintain a resident representative in Bermuda, this person is frequently provided by the local service providers but also a Bermuda exempted company that has appropriate objects can act as Resident Representative.
34 Section 10(10) of the EPA.
35 Section 12(1) of the EPA - the partnership must send to the Registrar a declaration stating the general nature of the business transacted by the exempted partnership each year.
36 Section 16 of the EPA – If in respect of a particular interval all the partners including limited partners agree in writing that no financial statements or auditors report needs to be prepared, there is no obligation to cause a financial statement or auditor's report to be prepared for that interval.
37 During the course of application for consent for an Exempted Partnership details of the beneficial ownership of the General Partners must be disclosed to the Bermuda Monetary Authority – this information is not available to the public. The Certificate of Particulars of Exempted Partnership must include the name and address of the General Partner - section 5 of the EPA. In the case of a Limited Partnership the register of limited partners must be maintained at the Registered Office of the Partnership and is available to be inspected by the public – section 7 and 8 of the Limited Partnership Act 1883.

BRITISH VIRGIN ISLANDS (INTERNATIONAL LIMITED PARTNERSHIP)
38 A memorandum which includes the names of all general partners must be submitted to the Registrar for registration. (The articles only have to be submitted to the registered agent of the limited partnership.)
39 However, must maintain a registered agent in the British Virgin Islands.
40 Section 82 The Partnership Act 1996.
41 Not required unless it is a public fund registered under the Mutual Funds Act 1996, in which case annual audited financial statements must be kept available for examination by the Registrar of Mutual Funds and all investors of the public fund at the fund's place of business or registered office in the British Virgin Islands. Managers and administrators of mutual funds are also required to appoint an auditor.
42 See footnote 40 above.
43 A memorandum which includes the names of all general partners is required to be filed at the Registry on establishment. An amendment to this memorandum is necessary to affect the admission of additional general partners. Additional limited partners are admitted by making an amendment to the articles which need not be filed at the Registry. The Anti-Money Laundering Code of Practice requires service providers to maintain records of identity in respect of new clients except in circumstances where the client has been introduced by a similarly regulated entity from another jurisdiction. These records need not be in the BVI as long as they are accessible and the service provider is satisfied that they are being mentioned.

CAYMAN ISLANDS (EXEMPTED LIMITED PARTNERSHIP)
44 Section 9(1) The Exempted Limited Partnership Law (2001 Revision) (the "ELPL") - An exempted limited partnership must be registered with the Registrar of Exempted Limited Partnerships. It comes into existence on completion of the partnership document but does not obtain the benefit of limited liability until registered.
45 At least one general partner must be an individual resident in the Cayman Islands or a company registered under the Companies Law or registered under Part IX of the Companies Law or a partnership registered under the ELPL.

46 Section 6(4) of ELPL.
47 Section 19 of the ELPL - an exempted partnership must file with the registrar each year a return certifying that the exempted partnership has complied with section 10(1) (notification of any changes) and there has been no breach of the declaration under section 9(1 (f) (not undertake business with the public in the Island).
48 Partner information which must be filed is set out in some detail in section 9(1)(d) of the ELPL. Changes in general partners must also be filed under section 10. A Register of Limited Partners is maintained at the registered office and is available for public inspection.

HONG KONG
49 Section 4 of the Limited Partnerships Ordinance – limited partnerships must be registered with the Companies Registry.
50 There are no statutory requirements for a registered office in Hong Kong; however, a limited partnership must carry on business in Hong Kong to take advantage of the Limited Partnerships Ordinance.
51 A limited partnership is not required to file its financial accounts with a central registry. However, a limited partnership must provide supporting information for its profits tax return which is filed with the Inland Revenue Department. The Inland Revenue Department has broad authority to require information to be provided to it by a taxpayer.
52 On the establishment of a partnership a statement which includes the names of all the partners, including limited partners must be filed with the Registry. Any change to the information in the statement must be filed.

ISLE OF MAN
53 Section 48(1) of the Partnership Act 1909. The Corporate Service Providers Act 2000 requires that any administration services to a limited partnership is a licensable activity. Under the terms of the corporate service provider regulatory codes and the AML Code, a corporate service provider is required to apply full KYC due diligence on the limited partnership including its constituent parties and partnership assets.
54 However, there is a requirement for a local partner if a tax exemption is required.
55 Sub-section 48A(1), The Partnership Act 1909 - Limited partnership must have a place of business on the Isle of Man.
56 Sub-sections 51(1A) and 51(1B) The Partnership Act 1909 – An annual statement containing the firm name; the general nature of the business; the principal place of business; the name and address of each partner; the name and address of each person who has ceased to be a partner since the last annual statement or, if there has been no previous statement, since the registration of the partnership; and a description of every limited partner or former limited partner.
57 Filing of accounts not normally required unless the partnership is licensed, eg under the Investment Business Act 1991.
58 The full name of all partners and their home addresses must be filed with the Registry on establishment and when changes occur. In addition see note 52 above for KYC due diligence by the corporate service provider.

JERSEY
59 Article 4 of the Limited Partnerships (Jersey) Law 1994 - in order to form a limited partnership under the Limited Partnerships (Jersey) Law 1994, a declaration must be filed with the Registrar of Limited Partnerships in Jersey stating the name of the partnership, its registered office in Jersey and details of the general partner, the duration of the partnership and such other particulars as may be prescribed.
60 Article 8(1) Limited Partnerships (Jersey) Law 1994 - the partnership must have a registered office in Jersey, notice of which (and any change in which) must be given to the Registrar of Limited Partnerships.
61 There is no requirement for a limited partnership to file its financial accounts with any central registry nor any tax authority.
62 Article 9(2) Limited Partnerships (Jersey) Law 1994 – Unless the partnership agreement provides otherwise, it is not necessary for a limited partnership to appoint an auditor or have its accounts audited.
63 Articles 4 and 5 Limited Partnerships (Jersey) Law 1994 - general partners' names must be filed on establishment and when changes occur. Article 8(4) - a register of limited partners must be held at the registered office but need not be filed.

As at 24 June 2002
Stikeman Elliott 2002

APPENDIX F
COUNTRIES REVIEWED IN FATF REPORT ON NON-COOPERATIVE COUNTRIES AND TERRITORIES (February 2000)

The countries reviewed were:

- Antigua & Barbuda
- Bahamas
- Belize
- Bermuda
- British Virgin Islands
- Cayman Islands
- Cook Islands
- Cyprus
- Dominica
- Gibraltar
- Guernsey
- The Isle of Man
- Jersey
- Israel
- Lebanon
- Liechtenstein
- Malta
- Marshall Islands
- Mauritius
- Monaco
- Nauru
- Niue
- Panama
- Philippines
- Russia
- Samoa
- St. Kitts and Nevis
- St. Lucia
- St. Vincent and the Grenadines

The countries and territories identified as non-cooperative in the fight against money laundering were:

- Bahamas
- Cayman Islands
- Cook Islands
- Dominica
- Israel
- Lebanon
- Liechtenstein
- Marshall Islands
- Nauru
- Niue
- Panama
- Philippines
- Russia
- St. Kitts and Nevis
- St. Vincent and the Grenadines

APPENDIX G

FATF 40 + 8 RECOMMENDATIONS

GENERAL FRAMEWORK OF THE RECOMMENDATIONS

Recommendation 1
Each country should take immediate steps to ratify and to implement fully, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention)

Recommendation 2
Financial institution secrecy laws should be conceived so as not to inhibit implementation of these recommendations.

Recommendation 3
An effective money laundering enforcement program should include increased multilateral co-operation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible.

ROLE OF NATIONAL LEGAL SYSTEMS IN COMBATING MONEY LAUNDERING

Scope of the Criminal Offence of Money Laundering

Recommendation 4
Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.

Recommendation 5
As provided in the Vienna Convention, the offence of money laundering should apply at least to knowing money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances.

Recommendation 6
Where possible, corporations themselves - not only their employees - should be subject to criminal liability.

Provisional Measures and Confiscation

Recommendation 7
Countries should adopt measures similar to those set forth in the Vienna Convention, as may be necessary, including legislative ones, to enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for

use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bona fide third parties.
Such measures should include the authority to: 1) identify, trace and evaluate property which is subject to confiscation; 2) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and 3) take any appropriate investigative measures.
In addition to confiscation and criminal sanctions, countries also should consider monetary and civil penalties, and/or proceedings including civil proceedings, to void contracts entered into by parties, where parties knew or should have known that as a result of the contract, the State would be prejudiced in its ability to recover financial claims, e.g. through confiscation or collection of fines and penalties.

ROLE OF THE FINANCIAL SYSTEM IN COMBATING MONEY LAUNDERING

Recommendation 8
Recommendations 10 to 29 should apply not only to banks, but also to non-bank financial institutions. Even for those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries, for example bureaux de change, governments should ensure that these institutions are subject to the same anti-money laundering laws or regulations as all other financial institutions and that these laws or regulations are implemented effectively.

Recommendation 9
The appropriate national authorities should consider applying Recommendations 10 to 21 and 23 to the conduct of financial activities as a commercial undertaking by businesses or professions which are not financial institutions, where such conduct is allowed or not prohibited. Financial activities include, but are not limited to, those listed in the attached annex. It is left to each country to decide whether special situations should be defined where the application of anti-money laundering measures is not necessary, for example, when a financial activity is carried out on an occasional or limited basis.

Customer Identification and Record-keeping Rules

Recommendation 10
Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).
In order to fulfil identification requirements concerning legal entities, financial institutions should, when necessary, take measures:

- to verify the legal existence and structure of the customer by obtaining either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity.

- to verify that any person purporting to act on behalf of the customer is so authorised and identify that person.

Recommendation 11
Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction conducted if there are any doubts as to whether these clients or customers are acting on their own behalf, for example, in the case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc. that do not conduct any commercial or manufacturing business or any other form of commercial operation in the country where their registered office is located).

Recommendation 12
Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour.
Financial institutions should keep records on customer identification (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the account is closed.
These documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations.

Recommendation 13
Countries should pay special attention to money laundering threats inherent in new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes.

Increased Diligence of Financial Institutions

Recommendation 14
Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 15
If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

Recommendation 16
Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

Recommendation 17
Financial institutions, their directors, officers and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities.

Recommendation 18
Financial institutions reporting their suspicions should comply with instructions from the competent authorities.

Recommendation 19
Financial institutions should develop programs against money laundering. These programs should include, as a minimum:

- the development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees;
- an ongoing employee training programme;
- an audit function to test the system.

Measures to Cope with the Problem of Countries with No or Insufficient Anti-Money Laundering Measures

Recommendation 20
Financial institutions should ensure that the principles mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply these Recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the mother institution should be informed by the financial institutions that they cannot apply these Recommendations.

Recommendation 21
Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Other Measures to Avoid Money Laundering

Recommendation 22
Countries should consider implementing feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

Recommendation 23
Countries should consider the feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerised data base, available to competent authorities for use in money laundering cases, subject to strict safeguards to ensure proper use of the information.

Recommendation 24
Countries should further encourage in general the development of modern and secure techniques of money management, including increased use of checks, payment cards, direct deposit of salary checks, and book entry recording of securities, as a means to encourage the replacement of cash transfers.

Recommendation 25
Countries should take notice of the potential for abuse of shell corporations by money launderers and should consider whether additional measures are required to prevent unlawful use of such entities.

Implementation and Role of Regulatory and Other Administrative Authorities

Recommendation 26
The competent authorities supervising banks or other financial institutions or intermediaries, or other competent authorities, should ensure that the supervised institutions have adequate programs to guard against money laundering. These authorities should co-operate and lend expertise spontaneously or on request with other domestic judicial or law enforcement authorities in money laundering investigations and prosecutions.

Recommendation 27
Competent authorities should be designated to ensure an effective implementation of all these Recommendations, through administrative supervision and regulation, in other professions dealing with cash as defined by each country.

Recommendation 28
The competent authorities should establish guidelines which will assist financial institutions in detecting suspicious patterns of behaviour by their customers. It is understood that such guidelines must develop over time, and will never be exhaustive. It

is further understood that such guidelines will primarily serve as an educational tool for financial institutions' personnel.

Recommendation 29
The competent authorities regulating or supervising financial institutions should take the necessary legal or regulatory measures to guard against control or acquisition of a significant participation in financial institutions by criminals or their confederates.

STRENGTHENING OF INTERNATIONAL CO-OPERATION

Administrative Co-operation
Exchange of general information

Recommendation 30
National administrations should consider recording, at least in the aggregate, international flows of cash in whatever currency, so that estimates can be made of cash flows and reflows from various sources abroad, when this is combined with central bank information. Such information should be made available to the International Monetary Fund and the Bank for International Settlements to facilitate international studies.

Recommendation 31
International competent authorities, perhaps Interpol and the World Customs Organisation, should be given responsibility for gathering and disseminating information to competent authorities about the latest developments in money laundering and money laundering techniques. Central banks and bank regulators could do the same on their network. National authorities in various spheres, in consultation with trade associations, could then disseminate this to financial institutions in individual countries.

Exchange of information relating to suspicious transactions

Recommendation 32
Each country should make efforts to improve a spontaneous or "upon request" international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.

Other Forms of Co-operation

Basis and means for co-operation in confiscation, mutual assistance and extradition

Recommendation 33
Countries should try to ensure, on a bilateral or multilateral basis, that different knowledge standards in national definitions - i.e. different standards concerning the intentional element of the infraction - do not affect the ability or willingness of countries to provide each other with mutual legal assistance.

Recommendation 34
International co-operation should be supported by a network of bilateral and multilateral agreements and arrangements based on generally shared legal concepts with the aim of providing practical measures to affect the widest possible range of mutual assistance.

Recommendation 35
Countries should be encouraged to ratify and implement relevant international conventions on money laundering such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.
Focus of improved mutual assistance on money laundering issues

Recommendation 36
Co-operative investigations among countries' appropriate competent authorities should be encouraged. One valid and effective investigative technique in this respect is controlled delivery related to assets known or suspected to be the proceeds of crime. Countries are encouraged to support this technique, where possible.

Recommendation 37
There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions.

Recommendation 38
There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate proceeds or other property of corresponding value to such proceeds, based on money laundering or the crimes underlying the laundering activity. There should also be arrangements for coordinating seizure and confiscation proceedings which may include the sharing of confiscated assets.

Recommendation 39
To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country. Similarly, there should be arrangements for coordinating seizure and confiscation proceedings which may include the sharing of confiscated assets.

Recommendation 40
Countries should have procedures in place to extradite, where possible, individuals charged with a money laundering offence or related offences. With respect to its national legal system, each country should recognise money laundering as an extraditable offence. Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgements, extraditing their

nationals, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

Annex to Recommendation 9: List of Financial Activities undertaken by business or professions which are not financial institutions

- Acceptance of deposits and other repayable funds from the public.
- Lending.[843]
- Financial leasing.
- Money transmission services.
- Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques and bankers' drafts...)
- Financial guarantees and commitments.
- Trading for account of customers (spot, forward, swaps, futures, options...) in:
- money market instruments (cheques, bills, CDs, etc.) ;
- foreign exchange;
- exchange, interest rate and index instruments;
- transferable securities;
- commodity futures trading.
- Participation in securities issues and the provision of financial services related to such issues.
- Individual and collective portfolio management.
- Safekeeping and administration of cash or liquid securities on behalf of clients.
- Life insurance and other investment related insurance.
- Money changing.

SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING

I. Ratification and implementation of UN instruments
Each country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries should also immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

II. Criminalising the financing of terrorism and associated money laundering
Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

III. Freezing and confiscating terrorist assets

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[843] Including inter alia

- consumer credit
- mortgage credit
- factoring, with or without recourse
- finance of commercial transactions (including forfeiting)

Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.
Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

IV. Reporting suspicious transactions related to terrorism
If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.

V. International Co-operation
Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.
Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations, and should have procedures in place to extradite, where possible, such individuals.

VI. Alternative remittance
Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

VII. Wire transfers
Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain.
Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number).

VIII. Non-profit organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

(i) by terrorist organisations posing as legitimate entities;

(ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

(iii)to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

APPENDIX H

OECD 19 Recommendations

In total 19 recommendations are put forward to deal with harmful tax practices. They are listed under the following categories:

Recommendations concerning domestic legislation and practices.

1. Controlled Foreign Corporations (CFCs) - Countries that do not have CFC rules consider adopting them.

2. Foreign investment fund or equivalent rules - Countries that do not have such rules adopt them to entities covered by practices considered to be harmful tax competition.

3. Restrictions on participation exemptions and other systems of exempting foreign income in the context of harmful tax competition - Countries that apply the exemption method to eliminate double taxation of foreign source income consider adopting rules that would ensure that foreign income benefiting from harmful tax competition practices does not qualify for the application of the exemption method.

4. Foreign information reporting rules - Countries that do not have rules concerning reporting of international transactions and foreign operations of resident taxpayers consider adopting such rules and that countries exchange information obtained under these rules.

5. Advanced rulings - Countries offering advanced rulings concerning the particular position of a taxpayer make public the conditions for offering or denying such rulings.

6. Transfer-pricing rules - Countries follow the guidelines set out in the OECD 1995 guidelines on transfer pricing and not promote harmful tax competition.

7. Access to banking information for tax purposes - Countries review their laws, regulations and practices which govern the access to banking information with the view to removing impediments to the access to such information by tax authorities.

II. Recommendations concerning tax treaties.

8. Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.

9. Entitlement to treaty benefits - Countries consider including in their tax convention provisions aimed at restricting the entitlement to treaty benefits for entities and income covered by measures constituting harmful tax practices.

10. Clarification of the status of domestic anti-abuse rules and doctrines in tax treaties - That the Commentary on the Model Tax Convention be clarified to remove any ambiguity regarding the compatibility of domestic anti-abuse measures with the Model Tax Convention.

11. List of specific exclusion provisions found in treaties - The Committee should prepare a list of provisions used by countries to exclude from the benefits of tax conventions certain specific entities and types of income.

12. Tax treaties with tax havens - Countries consider terminating their tax conventions with tax havens and consider not entering into tax treaties with such countries in the future.

13. Coordinated enforcement regimes (Joint audits, etc.) - Countries consider undertaking joint enforcement programs such as simultaneous audits and examinations, in relation to income or taxpayers benefiting from practices constituting harmful tax competition.

14. Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.

Recommendations to intensify international cooperation in response to harmful tax competition.

15. Guidelines and a forum on harmful tax practices - Member countries endorse the guidelines set out in the following list dealing with harmful preferential tax regimes.

16. Produce a list of tax havens - The Forum mandated to establish within one year of the first meeting of the Forum, a list of tax havens on the basis of factors identified in this report.

17. Links with tax havens - Countries that have links to tax havens ensure that these links do not contribute to harmful tax competition and in particular, that countries with dependencies that are tax havens ensure that the links with these territories are not used to promote or increase harmful tax competition.

18. Develop and promote Principles of Good Tax Administration - The Committee be responsible for developing and promoting a set of principles to guide tax administrations in the enforcement of guidelines in this report.

19. Associating non-member countries with the Recommendations - The Forum engage in dialogue with non-member nations to promote these recommendations.

APPENDIX I

FATF'S POLICY CONCERNING IMPLEMENTATION AND DE-LISTING IN RELATION TO NCCTs

The FATF has articulated the steps that need to be taken by Non-Cooperative Countries or Territories (NCCTs) in order to be removed from the NCCT list. These steps have focused on what precisely should be required by way of implementation of legislative and regulatory reforms made by NCCTs to respond to the deficiencies identified by the FATF in the NCCT reports. This policy concerning implementation and de-listing enables the FATF to achieve equal and objective treatment among NCCT jurisdictions.

In order to be removed from the NCCT list:

1. An NCCT must enact laws and promulgate regulations that comply with international standards to address the deficiencies identified by the NCCT report that formed the basis of the FATF's decision to place the jurisdiction on the NCCT list in the first instance.

2. The NCCTs that have made substantial reform in their legislation should be requested to submit to the FATF through the applicable regional review group, an implementation plan with targets, milestones, and time frames that will ensure effective implementation of the legislative and regulatory reforms. The NCCT should be asked particularly to address the following important determinants in the FATF's judgement as to whether it can be de-listed: filing of suspicious activity reports; analysis and follow-up of reports; the conduct of money laundering investigations; examinations of financial institutions (particularly with respect to customer identification); international exchange of information; and the provision of budgetary and human resources.

3. The appropriate regional review groups should examine the implementation plans submitted and prepare a response for submission to the NCCT at an appropriate time. The Chairs of the four review groups (Americas; Asia/Pacific; Europe; Africa and the Middle East) should report regularly on the progress of their work. A meeting of those Chairs, if necessary, to keep consistency among their responses to the NCCTs.

4. The FATF, on the initiative of the applicable review group chair or any member of the review group, should make an on-site visit to the NCCT at an appropriate time to confirm effective implementation of the reforms.

5. The review group chair shall report progress at subsequent meetings of the FATF. When the review groups are satisfied that the NCCT has taken <u>sufficient steps to ensure continued effective implementation</u> of the reforms, they shall recommend to the Plenary the removal of the jurisdiction from the NCCT list. Based on an overall

assessment encompassing the determinants in paragraph 2, the FATF will rely on its collective judgement in taking the decision.

6. Any decision to remove countries from the list should be accompanied by a letter from the FATF President:

(a) clarifying that de-listing does not indicate a perfect anti-money laundering system;
(b) setting out any outstanding concerns regarding the jurisdiction in question;
(c) proposing a monitoring mechanism to be carried out by FATF in consultation with the relevant FATF-style regional body, which would include the submission of regular implementation reports to the relevant review group and a follow-up visit to assess progress in implementing reforms and to ensure that stated goals have, in fact, been fully achieved.

APPENDIX J

GLOBAL ANTI-MONEY-LAUNDERING GUIDELINES FOR PRIVATE BANKING
WOLFSBERG[844] AML PRINCIPLES
(1ST REVISION, MAY 2002)

The following major International Private Banks

ABN AMRO Bank N.V.
Bance Santander Central Hispano
Bank of Tokyo-Mitsubishi Ltd
Barclays Bank
Citigroup
Credit Suisse Group
Deutsche Bank AG
Goldman Sachs
HSBC
J.P. Morgan Private Bank
Société Générale
UBS AG

have agreed to the following principles as important global guidance for sound business conduct in international private banking.

Acknowledgement

The banks collaborated with a team from Transparency International[845] who invited two international experts to participate, Stanley Morris[846] and Prof. Mark Pieth[847]. Transparency International and the experts regard the principles as an important step in the fight against money laundering, corruption and other related serious crimes.

30.10.2000
www.wolfsberg-principles.com

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[844] Wolfsberg is the location in Switzerland where an important working session to formulate the guidelines was held.

[845] Transparency International (TI) is a Berlin based non-governmental organization, dedicated to increasing government accountability and curbing both international and national corruption. TI is active in more than 70 countries. TI was represented by its founder and Chairman of the Board, Peter Eigen and the Chairman of their US chapter, Fritz Heimann.

[846] Stanley E. Morris is an international Consultant on Anti Money Laundering issues. He was head of FinCEN and a member of the Financial Action Task Force on Money Laundering (FATF).

[847] Prof. Mark Pieth is a law professor in Basel, Switzerland. He is Chairman of the OECD Working Group on Bribery and Corruption and a former member of the Financial Action Task Force on Money Laundering (FATF).

Preamble

The following guidelines are understood to be appropriate for private banking relationships. Guidelines for other market segments may differ. It is recognized that the establishment of policies and procedures to adhere to these guidelines is the responsibility of management.

1 Client acceptance: general guidelines

1.1 General

Bank policy will be to prevent the use of its worldwide operations for criminal purposes. The bank will endeavour to accept only those clients whose source of wealth and funds can be reasonably established to be legitimate. The primary responsibility for this lies with the private banker who sponsors the client for acceptance. Mere fulfilment of internal review procedures does not relieve the private banker of this basic responsibility.

1.2 Identification

The bank will take reasonable measures to establish the identity of its clients and beneficial owners and will only accept clients when this process has been completed.

1.2.1 Client

- Natural persons: identity will be established to the bank's satisfaction by reference to official identity papers or such other evidence as may be appropriate under the circumstances.
- Corporations, partnerships, foundations: the bank will receive documentary evidence of the due organization and existence.
- Trusts: the bank will receive appropriate evidence of formation and existence along with identity of the trustees.
- Identification documents must be current at the time of opening.

1.2.2 Beneficial owner

Beneficial ownership must be established for all accounts. Due diligence must be done on all principal beneficial owners identified in accordance with the following principles:

- Natural persons: when the account is in the name of an individual, the private banker must establish whether the client is acting on his/her own behalf. If doubt exists, the bank will establish the capacity in which and on whose behalf the accountholder is acting.
- Legal entities: where the client is a company, such as a private investment company, the private banker will understand the structure of the company sufficiently to determine the provider of funds, principal owner(s) of the shares and those who have control over the funds, e.g. the directors and those with the power to give direction to the directors of the company. With regard to other shareholders the private banker will make a reasonable judgement as to the need for further due diligence. This principle applies regardless of whether the share capital is in registered or bearer form.
- Trusts: where the client is a trustee, the private banker will understand the structure of the trust sufficiently to determine the provider of funds (e.g. settlor) those who have control over the funds (e.g. trustees) and any persons or entities

who have the power to remove the trustees. The private banker will make a reasonable judgement as to the need for further due diligence.

- Unincorporated associations: the above principles apply to unincorporated associations.
- The bank will not permit the use of its internal non-client accounts (sometimes referred to as "concentration" accounts) to prevent association of the identity of a client with the movement of funds on the client's behalf, i.e., the bank will not permit the use of such internal accounts in a manner that would prevent the bank from appropriately monitoring the client's account activity.

1.2.3 Accounts held in the name of money managers and similar intermediaries

The private banker will perform due diligence on the intermediary and establish that the intermediary has a due diligence process for its clients, or a regulatory obligation to conduct such due diligence, that is satisfactory to the bank.

1.2.4 Powers of attorney/Authorized signers

Where the holder of a power of attorney or another authorized signer is appointed by a client, it is generally sufficient to do due diligence on the client.

1.2.5 Practices for walk-in clients and electronic banking relationships

A bank will determine whether walk-in clients or relationships initiated through electronic channels require a higher degree of due diligence prior to account opening. The bank will specifically address measures to satisfactorily establish the identity of non-face-to-face customers.

1.3 Due diligence

It is essential to collect and record information covering the following categories:

- Purpose and reasons for opening the account
- Anticipated account activity
- Source of wealth (description of the economic activity which has generated the net worth)
- Estimated net worth
- Source of funds (description of the origin and the means of transfer for monies that are accepted for the account opening)
- References or other sources to corroborate reputation information where available.
- Unless other measures reasonably suffice to do the due diligence on a client (e.g. favourable and reliable references), a client will be met prior to account opening.

1.4 Numbered or alternate name accounts

Numbered or alternate name accounts will only be accepted if the bank has established the identity of the client and the beneficial owner. These accounts must be open to a level of scrutiny by the bank's appropriate control layers equal to the level of scrutiny applicable to other client accounts.

1.5 Offshore jurisdictions

Risks associated with entities organized in offshore jurisdictions are covered by due diligence procedures laid out in these guidelines.

1.6 Oversight responsibility

There will be a requirement that all new clients and new accounts be approved by at least one person other than the private banker.

2 Client acceptance: situations requiring additional diligence / attention

2.1 General

In its internal policies, the bank must define categories of persons whose circumstances warrant additional diligence. This will typically be the case where the circumstances are likely to pose a higher than average risk to a bank.

2.2 Indicators

The circumstances of the following categories of persons are indicators for defining them as requiring additional diligence:

- Persons residing in and/or having funds sourced from countries identified by credible sources as having inadequate anti-money laundering standards or representing high risk for crime and corruption.
- Persons engaged in types of business activities or sectors known to be susceptible to money laundering.
- "Politically Exposed Persons" (frequently abbreviated as "PEPs"), referring to individuals holding or having held positions of public trust, such as government officials, senior executives of government corporations, politicians, important political party officials, etc., as well as their families and close associates.

2.3 Senior management approval

The banks' internal policies should indicate whether, for any one or more among these categories, senior management must approve entering into new relationships. Relationships with Politically Exposed Persons may only be entered into with the approval from senior management.

3 Updating client files

3.1 The private banker is responsible for updating the client file on a defined basis and/or when there are major changes. The private banker's supervisor or an independent control person will review relevant portions of client files on a regular basis to ensure consistency and completeness. The frequency of the reviews depends on the size, complexity and risk posed of the relationship.

3.2 With respect to clients classified under any category of persons mentioned in 2, the banks internal policies will indicate whether senior management must be involved in these reviews.

3.3 Similarly, with respect to clients classified as set forth in 3.2, the bank's internal policies will indicate what management information must be provided to management and/or other control layers. The policies should also address the frequency of these information flows.

3.4 The reviews of PEPs must require senior management's involvement.

4 Practices when identifying unusual or suspicious activities

4.1 Definition of unusual or suspicious activities

The bank will have a written policy on the identification of and follow-up on unusual or suspicious activities. This policy will include a definition of what is considered to be suspicious or unusual and give examples thereof.

Unusual or suspicious activities may include:

- Account transactions or other activities which are not consistent with the due diligence file
- Cash transactions over a certain amount
- Pass-through / in-and-out-transactions.

4.2 Identification of unusual or suspicious activities

- Unusual or suspicious activities can be identified through:
- Monitoring of transactions
- Client contacts (meetings, discussions, in-country visits etc.)
- Third party information (e.g. newspapers, Reuters, internet)
- Private banker's / internal knowledge of the client's environment (e.g. political situation in his/her country).

4.3 Follow-up on unusual or suspicious activities

The private banker, management and/or the control function will carry out an analysis of the background of any unusual or suspicious activity. If there is no plausible explanation a decision will be made involving the control function:

- To continue the business relationship with increased monitoring
- To cancel the business relationship
- To report the business relationship to the authorities.

The report to the authorities is made by the control function and senior management may need to be notified (e.g. Senior Compliance Officer, CEO, Chief Auditor, General Counsel). As required by local laws and regulations the assets may be blocked and transactions may be subject to approval by the control function.

5 Monitoring

5.1 Monitoring Program

A sufficient monitoring program must be in place. The primary responsibility for monitoring account activities lies with the private banker. The private banker will be familiar with significant transactions and increased activity in the account and will be especially aware of unusual or suspicious activities (see 4.1). The bank will decide to what extent fulfilment of these responsibilities will need to be supported through the use of automated systems or other means.

5.2 Ongoing Monitoring

With respect to clients classified under any category of persons mentioned in 2, the bank's internal policies will indicate how the account activities will be subject to monitoring.

6 Control responsibilities

A written control policy will be in place establishing standard control procedures to be undertaken by the various "control layers" (private banker, independent operations unit, Compliance, Internal Audit). The control policy will cover issues of timing, degree of control, areas to be controlled, responsibilities and follow-up, etc.

An independent audit function (which may be internal to the bank) will test the programs contemplated by the control policy.

7 Reporting

There will be regular management reporting established on money laundering issues (e.g. number of reports to authorities, monitoring tools, changes in applicable laws and regulations, the number and scope of training sessions provided to employees).

8 Education, training and information

The bank will establish a training program on the identification and prevention of money laundering for employees who have client contact and for Compliance personnel. Regular training (e.g. annually) will also include how to identify and follow-up on unusual or suspicious activities. In addition, employees will be informed about any major changes in anti-money-laundering laws and regulations. All new employees will be provided with guidelines on the anti-money-laundering procedures.

9 Record retention requirements

The bank will establish record retention requirements for all anti-money-laundering related documents. The documents must be kept for a minimum of five years.

10 Exceptions and deviations

The bank will establish an exception and deviation procedure that requires risk assessment and approval by an independent unit.

11 Anti-money-laundering organization

The bank will establish an adequately staffed and independent department responsible for the prevention of money laundering
(e.g. Compliance, independent control unit, Legal).

APPENDIX K

LIST OF OECD INITIATIVES RELATED TO CORRUPTION

- Recommendation to the Council on the Tax Deductibility of Bribes to Foreign Public Officials
- Recommendation on Improving Ethical Conduct in the Public Service (1998)
- Convention of Combating Bribery of Foreign Public Officials in International Business Transactions (1997)
- Revised Recommendation on Combating Bribery in International Business Transactions 1997 (revising the Recommendation on bribery in International Business Transactions 1994)
- Recommendation to Combat Corruption in Aid-Funded Procurement (1997)
- Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996)
- Civil Law Convention on Corruption 1999
- Criminal Law Convention on Corruption 1998
- Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union 1997
- Inter-American Convention Against Corruption 1996
- United Nations General Assembly Resolutions 51/59 and 51/191

Please visit www.oecd.org for the details and updates.

APPENDIX L

CORRUPTION, DRUG TRAFFICKING AND OTHER SERIOUS CRIMES (CONFISCATION OF BENEFITS) ACT OF SINGAPORE

(CHAPTER 65A)

SECOND SCHEDULE

Section 2

SERIOUS OFFENCES

Offences	*Description**
1. Section 44 of this Act	Assisting another to retain benefits from criminal conduct
2. Section 47 of this Act	Concealing or transferring benefits from criminal conduct
Children and Young Persons Act (Cap. 38)	
3. Section 4 (1), 5 (*a*) and (*b*)	Ill-treatment of child or young person.
Corrosive and Explosive Substances and Offensive Weapons Act (Cap. 65)	
4. Section 3	Possession of corrosive or explosive substance for purpose of causing hurt
Hijacking of Aircraft and Protection of Aircraft and International Airports Act (Cap. 124)	
5. Section 3 (3)	Hijacking
6. Section 4	Violence against passengers or crew
7. Section 5	Destroying, damaging or endangering safety of aircraft
8. Section 7	Endangering safety at aerodromes
Kidnapping Act (Cap. 151)	
9. Section 3	Abduction, wrongful restraint or wrongful confinement for ransom
10. Section 4	Knowingly receiving ransom
11. Section 5	Knowingly negotiating to obtain or for payment of ransom
Penal Code (Cap. 224)	
12. Section 130	Aiding escape of, rescuing, or harbouring such prisoner
13. Section 130B	Piracy by law of nations

14. Section 130C	Piratical acts
15. Section 161	Public servant taking a gratification, other than legal remuneration, in respect of an official act
16. Section 162	Taking a gratification in order, by corrupt or illegal means, to influence a public servant
17. Section 164	Punishment for abetment by public servant of the offences above defined
18. Section 165	Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant
19. Section 181	False statement on oath to public servant or person authorised to administer an oath
20. Section 193	Punishment for false evidence
21. Section 194	Giving or fabricating false evidence with intent to procure conviction of a capital offence
22. Section 195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment
23. Section 196	Using evidence known to be false
24. Section 201	Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender
25. Section 203	Giving false information respecting an offence committed
26. Section 204	Destruction of document to prevent its production as evidence
27. Section 205	False personation for the purpose of any act or proceeding in a suit
28. Section 206	Fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of a decree
29. Section 207	Fraudulent claim to property to prevent its seizure as a forfeiture or in execution of a decree
30. Section 208	Fraudulently suffering a decree for a sum not due
31. Section 212	Harbouring an offender
32. Section 213	Taking gift, etc., to screen an offender from punishment
33. Section 214	Offering gift or restoration of property in

	consideration of screening offender
34. Section 215	Taking gift to help to recover stolen property, etc.
35. Section 216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered
36. Section 216A	Harbouring robbers or gang-robbers, etc.
37. Section 217	Public servant disobeying a direction of law with intent to save person from punishment or property from forfeiture
38. Section 218	Public servant framing an incorrect record or writing with intent to save person from punishment or property from forfeiture
39. Section 221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend
40. Section 222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of court of justice
41. Section 225A	Public servant omitting to apprehend or suffering other persons to escape in cases not already provided for
42. Section 231	Counterfeiting coin
43. Section 232	Counterfeiting current coin
44. Section 233	Making or selling instrument for counterfeiting coin
45. Section 234	Making or selling instrument for counterfeiting current coin
46. Section 235	Possession of instrument or material for the purpose of using the same for counterfeiting coin
47. Section 236	Abetting in Singapore the counterfeiting out of Singapore of coin
48. Section 237	Import or export of counterfeit coin
49. Section 238	Import or export of counterfeits of current coin
50. Section 239	Delivery to another of coin possessed with knowledge that it is counterfeit
51. Section 240	Delivery of current coin, possessed with the knowledge that it is counterfeit
52. Section 241	Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be counterfeit

53. Section 242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof
54. Section 302	Punishment for murder
55. Section 304	Punishment for culpable homicide not amounting to murder
56. Section 307 (1)	Attempt to murder
57. Section 307 (2)	Other offences by convicts
58. Section 308	Attempt to commit culpable homicide
59. Section 312	Causing miscarriage
60. Section 313	Causing miscarriage without woman's consent
61. Section 315 (1)	Child destruction before, at or immediately after birth
62. Section 316	Causing death of a quick unborn child by an act amounting to culpable homicide
63. Section 324	Voluntarily causing hurt by dangerous weapons or means
64. Section 325	Punishment for voluntarily causing grievous hurt
65. Section 326	Voluntarily causing grievous hurt by dangerous weapons or means
66. Section 327	Voluntarily causing hurt to extort property or to constrain to an illegal act
67. Section 328	Causing hurt by means of poison, etc., with intent to commit an offence
68. Section 329	Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act
69. Section 330	Voluntarily causing hurt to extort confession or to compel restoration of property
70. Section 331	Voluntarily causing grievous hurt to extort confession or to compel restoration of property
71. Section 332	Voluntarily causing hurt to deter public servant from his duty
72. Section 333	Voluntarily causing grievous hurt to deter public servant from his duty
73. Section 335	Causing grievous hurt on provocation
74. Section 338	Causing grievous hurt by an act which endangers life or personal safety of others
75. Section 343	Wrongful confinement for 3 or more days

76. Section 344	Wrongful confinement for 10 or more days
77. Section 345	Wrongful confinement of person for whose liberation a writ has been issued
78. Section 346	Wrongful confinement in secret
79. Section 347	Wrongful confinement for the purpose of extorting property or constraining to an illegal act
80. Section 348	Wrongful confinement for the purpose of extorting confession or of compelling restoration of property
81. Section 354	Assault or use of criminal force to a person with intent to outrage modesty
82. Section 354A	Outraging modesty in certain circumstances
83. Section 363	Punishment for kidnapping
84. Section 364	Kidnapping or abducting in order to murder
85. Section 365	Kidnapping or abducting with intent to secretly and wrongfully to confine a person
86. Section 366	Kidnapping or abducting a woman to compel her marriage, etc.
87. Section 367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.
88. Section 368	Wrongfully concealing or keeping in confinement a kidnapped person
89. Section 369	Kidnapping or abducting child under 10 years with intent to steal moveable property from the person of such child
90. Section 370	Buying or disposing of any person as a slave
91. Section 371	Habitual dealing in slaves
92. Section 372	Selling minor for purposes of prostitution, etc.
93. Section 373	Buying minor for purposes of prostitution, etc.
94. Section 373A	Importing by fraud, brings, assist in bringing, sells or buys, with intent that any woman be used for purpose of prostitution
95. Section 376 (1) and (2)	Punishment for rape
96. Section 379	Punishment for theft
97. Section 379A	Punishment for theft of a motor vehicle
98. Section 380	Theft in dwelling house, etc.
99. Section 381	Theft by clerk or servant of property in possession of master

100. Section 382	Theft after preparation made for causing death or hurt in order to commit theft
101. Section 384	Punishment for extortion
102. Section 385	Putting person in fear of injury in order to commit extortion
103. Section 386	Extortion by putting a person in fear of death or grievous hurt
104. Section 387	Putting person in fear of death or of grievous hurt in order to commit extortion
105. Section 388	Extortion by threat of accusation of an offence punishable with death, or inprisonment, etc.
106. Section 389	Putting person in fear of accusation of offence, in order to commit extortion
107. Section 392	Punishment for robbery
108. Section 393	Attempt to commit robbery
109. Section 394	Voluntarily causing hurt in committing robbery
110. Section 395	Punishment for gang-robbery
111. Section 396	Gang-robbery with murder
112. Section 399	Making preparation to commit gang-robbery
113. Section 400	Punishment for belonging to gang-robbers
114. Section 402	Assembling for purpose of committing gang-robbery
115. Section 403	Dishonest misappropriation of property
116. Section 404	Dishonest misappropriation of property possessed by a deceased person at the time of his death
117. Section 406	Punishment of criminal breach of trust
118. Section 407	Criminal breach of trust by carrier, etc.
119. Section 408	Criminal breach of trust by clerk or servant
120. Section 409	Criminal breach of trust by public servant, or by banker, merchant or agent
121. Section 411	Dishonestly receiving stolen property
122. Section 412	Dishonestly receiving property stolen in the commission of a gang-robbery
123. Section 413	Habitually dealing in stolen property
124. Section 414	Assisting in concealment of stolen property
125. Section 418	Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect

126. Section 419	Punishment for cheating by personation
127. Section 420	Cheating and dishonestly inducing a delivery of property
128. Section 421	Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors
129. Section 422	Dishonestly or fraudulently preventing a debt or demand due to the offender from being made available for his creditors
130. Section 423	Dishonest or fraudulent execution of deed of transfer containing a false statement of consideration
131. Section 424	Dishonest or fraudulent removal or concealment of property or release of claim
132. Section 430A	Mischief affecting railway engine, train, etc.
133. Section 431	Mischief by injury to public road, bridge or river
134. Section 431A	Mischief by injury to telegraph cable, wire, etc.
135. Section 432	Mischief by causing inundation or obstruction to public drainage, attended with damage
136. Section 433	Mischief by destroying or moving or rendering less useful a lighthouse or sea-mark
137. Section 435	Mischief by fire or explosive substance with intent to cause damage to amount of $50
138. Section 436	Mischief by fire or explosive substance with intent to destroy a house, etc.
139. Section 438	Punishment for the mischief described in section 437 when committed by fire or any explosive substance
140. Section 439	Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.
141. Section 440	Mischief committed after preparation made for causing death or hurt
142. Section 449	House-trespass in order to commit an offence punishable with death
143. Section 450	House-trespass in order to commit an offence punishable with imprisonment for life
144. Section 451	House-trespass in order to commit an offence punishable with imprisonment

145. Section 452	House-trespass after preparation made for causing hurt, etc.
146. Section 453	Punishment for lurking house-trespass or house-breaking
147. Section 454	Lurking house-trespass or house-breaking in order to commit an offence punishable with imprisonment
148. Section 455	Lurking house-trespass or house-breaking after preparation made for causing hurt, etc.
149. Section 456	Punishment for lurking house-trespass by night or house-breaking by night
150. Section 457	Lurking house-trespass by night or house-breaking by night in order to commit an offence punishable with imprisonment
151. Section 458	Lurking house-trespass or house-breaking by night after preparation made for causing hurt, etc.
152. Section 459	Grievous hurt caused while committing lurking house-trespass or house-breaking
153. Section 460	Lurking house-trespass by night or house-breaking by night when death or grievous hurt is caused
154. Section 465	Punishment for forgery
155. Section 466	Forgery of record of a court of justice, or a public register of births, etc.
156. Section 467	Forgery of a valuable security or will
157. Section 468	Forgery for the purpose of cheating
158. Section 469	Forgery for the purpose of harming the reputation of any person
159. Section 471	Using as genuine a forged document
160. Section 472	Making or possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467
161. Section 473	Making or possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable otherwise
162. Section 474	Having possession of a valuable security or will known to be forged, with intent to use it as genuine
163. Section 475	Counterfeiting a device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material
164. Section 476	Counterfeiting a device or mark used for

	authenticating documents other than those described in section 467, or possessing counterfeit marked material
165. Section 489A	Forging or counterfeiting currency notes or bank notes
166. Section 489B	Using as genuine forged or counterfeit currency notes or bank notes
167. Section 489C	Possession of forged or counterfeit currency notes or bank notes
Prevention of Corruption Act (Cap. 241)	
168. Section 5	Punishment for corrupt transactions where no agents involved
169. Section 6	Punishment for corrupt transactions involving agents or use of false documents to mislead principal
170. Section 10	Bribery in relation to Government contracts
171. Section 11	Bribery of Member of Parliament
172. Section 12	Bribery of member of public body
173. Section 29	Abetment of offences
174. Section 30	Attempts
175. Section 31	Conspiracy
Termination of Pregnancy Act (Cap. 324)	
176. Section 3 (4)	Medical termination of pregnancy
177. Section 5	Coercion or intimidation
Vandalism Act (Cap. 341)	
178. Section 3	Penalty for acts of vandalism
Women's Charter (Cap. 353)	
179. Section 140	Offences relating to prostitution
180. Section 141	Trafficking in women and girls
181. Section 142	Importation of woman or girl by false pretences
182. Section 145	Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl below the age of 16

[25/99]

APPENDIX M

MAS 626 dated 11 Nov 2002

Notice to Banks
Banking Act, CAP 19

Examples of Suspicious Transactions

1. General Comments

The list of situations given below is intended mainly as a means of highlighting the basic ways in which money may be laundered. While each individual situation may not be sufficient to suggest that money laundering is taking place, a combination of such situations may be indicative of such a transaction. Further, the list is by no means complete, and will require constant updating and adaptation to changing circumstances and new methods of laundering money. The list is intended solely as an aid, and must not be applied as a routine instrument in place of common sense.

A customer's declarations regarding the background of such transactions should be checked for plausibility. Not every explanation offered by the customer can be accepted without scrutiny.

It is justifiable to suspect any customer who is reluctant to provide normal information and documents required routinely by the bank in the course of the business relationship. Banks should pay attention to customers who provide minimal, false or misleading information or, when applying to open an account, provide information that is difficult or expensive for the bank to verify.

2. Transactions Which Do Not Make Economic Sense

i) A customer-relationship with the bank that does not appear to make economic sense, for example, a customer having a large number of accounts with the same bank, frequent transfers between different accounts or exaggeratedly high liquidity;

ii) Transactions in which assets are withdrawn immediately after being deposited, unless the customer's business activities furnish a plausible reason for immediate withdrawal;

iii) Transactions that cannot be reconciled with the usual activities of the customer, for example, the use of Letters of Credit and other methods of trade finance to move money between countries where such trade is not consistent with the customer's usual business;

iv) Transactions which, without plausible reason, result in the intensive use of what was previously a relatively inactive account, such as a customer's account which shows virtually no normal personal or business related activities but is used to receive or disburse unusually large sums which have no obvious purpose or relationship to the customer and/or his business;

v) Provision of bank guarantees or indemnities as collateral for loans between third parties that are not in conformity with market conditions;

vi) Unexpected repayment of an overdue credit without any plausible explanation;

vii) Back-to-back loans without any identifiable and legally admissible purpose.

3. Transactions Involving Large Amounts of Cash

i) Exchanging an unusually large amount of small-denominated notes for those of higher denomination;

ii) Purchasing or selling of foreign currencies in substantial amounts by cash settlement despite the customer having an account with the bank;

iii) Frequent withdrawal of large amounts by means of cheques, including traveller's cheques;

iv) Frequent withdrawal of large cash amounts that do not appear to be justified by the customer's business activity;

v) Large cash withdrawals from a previously dormant/inactive account, or from an account which has just received an unexpected large credit from abroad;

vi) Company transactions, both deposits and withdrawals, that are denominated by unusually large amounts of cash, rather than by way of debits and credits normally associated with the normal commercial operations of the company, e.g. cheques, letters of credit, bills of exchange, etc;

vii) Depositing cash by means of numerous credit slips by a customer such that the amount of each deposit is not substantial, but the total of which is substantial;

viii) The deposit of unusually large amounts of cash by a customer to cover requests for bankers' drafts, money transfers or other negotiable and readily marketable money instruments;

ix) Customers whose deposits contain counterfeit notes or forged instruments;

x) Large cash deposits using night safe facilities, thereby avoiding direct contact with the bank;

xi) Customers making large and frequent cash deposits but cheques drawn on the accounts are mostly to individuals and firms not normally associated with their business;

xii) Customers who together, and simultaneously, use separate tellers to conduct large cash transactions or foreign exchange transactions.

4. Transactions Involving Bank Accounts

i) Matching of payments out with credits paid in by cash on the same or previous day;

ii) Paying in large third party cheques endorsed in favour of the customer;

iii) Substantial increases in deposits of cash or negotiable instruments by a professional firm or company, using client accounts or in-house company or trust accounts, especially if the deposits are promptly transferred between other client company and trust accounts;

iv) High velocity of funds through an account, i.e., low beginning and ending daily balances, which do not reflect the large volume of funds flowing through an account;

v) Multiple depositors using a single bank account;

vi) An account opened in the name of a moneychanger that receives structured deposits;

vii) An account operated in the name of an offshore company with structured movement of funds.

5. Transactions Involving Transfers Abroad

i) Transfer of money abroad by an interim customer[848] in the absence of any legitimate reason;

ii) A customer which appears to have accounts with several banks in the same locality, especially when the bank is aware of a regular consolidated process from such accounts prior to a request for onward transmission of the funds elsewhere;

iii) Repeated transfers of large amounts of money abroad accompanied by the instruction to pay the beneficiary in cash;

iv) Large and regular payments that cannot be clearly identified as bona fide transactions, from and to countries associated with (i) the production, processing or marketing of narcotics or other illegal drugs or (ii) criminal conduct;

v) Substantial increase in cash deposits by a customer without apparent cause, especially if such deposits are subsequently transferred within a short period out of the account and/or to a destination not normally associated with the customer;

[848] An interim customer is one who is not a regular customer of the bank in question, or does not maintain an account, deposit account, safe deposit box, etc. with the bank.

vi) Building up large balances, not consistent with the known turnover of the customer's business, and subsequent transfer to account(s) held overseas;

vii) Cash payments remitted to a single account by a large number of different persons without an adequate explanation.

6. Investment Related Transactions

i) Purchasing of securities to be held by the bank in safe custody, where this does not appear appropriate given the customer's apparent standing;

ii) Requests by a customer for investment management services where the source of funds is unclear or not consistent with the customer's apparent standing;

iii) Larger or unusual settlements of securities transactions in cash form;

iv) Buying and selling of a security with no discernible purpose or in circumstances which appear unusual.

7. Transactions Involving Unidentified Parties

i) Provision of collateral by way of pledge or guarantee without any discernible plausible reason by third parties unknown to the hank and who have no identifiable close relationship with the customer;

ii) Transfer of money to another bank without indication of the beneficiary;

iii) Payment orders with inaccurate information concerning the person placing the orders;

iv) Use of pseudonyms or numbered accounts for effecting commercial transactions by enterprises active in trade and industry;

v) Holding in trust of shares in an unlisted company whose activities cannot be ascertained by the bank;

vi) Customers who wish to maintain a number of trustee or clients' accounts that do not appear consistent with their type of business, including transactions that involve nominee names.

8. Miscellaneous Transactions

i) Purchase or sale of large amounts of precious metals by an interim customer;

ii) Purchase of bank cheques on a large scale by an interim customer;

iii) Extensive or increased use of safe deposit facilities that do not appear to be justified by the customer's personal or business activities.

APPENDIX N

Dates of Tax Haven Commitments to OECD Project and Release of OECD Reports

Extracted from Weiner, Joann M., "OECD Forum on Harmful Tax Practiees Marks Fifth Year", Tax Notes International, Vol 31, Issue 3, 21 July 2003

Jurisdiction	Date of Letter
Advance Commitments	
San Marino	4 April 2000
Bermuda	15 May 2000
Cayman Islands	18 May 2000
Malta	19 May 2000
Cyprus	24 May 2000
Mauritius	24 May 2000
→Release of June report listing 35 potential tax havens	
Schedules Commitments	
Netherlands Antilles	30 Nov 2000
Isle of Man	13 Dec 2000
Seychelles	13 Feb 2001
Aruba	31 May 2001
Bahrain	11 Sep 2001
→Release of November report	
→Commitment deadline extended to 28 February 2002	
Antigua and Barbuda	20 Feb 2002
Guernsey	22 Feb 2002
Jersey	22 Feb 2002
St. Vincent	26 Feb 2002
Gibraltar	27 Feb 2002
Grenada	27 Feb 2002
Montserrat	27 Feb 2002
St. Lucia	28 Feb 2002
U.S. Virgin Islands	04 Mar 2002
Anguilla	05 Mar 2002
Dominica	05 Mar 2002
St. Kitts and Nevis	05 Mar 2002
Belize	08 Mar 2002
Turks & Caicos Islands	08 Mar 2002
Bahamas	15 Mar 2002
Cook Islands	22 Mar 2002
British Virgin Islands	02 Apr 2002
Samoa	09 Apr 2002
Niue	11 Apr 2002
Panama	15 Apr 2002
→Release on 18 April 2002 list of uncooperative tax havens	
Vanuatu	07 May 2003

APPENDIX O

OECD Tax Haven Commitment Letters

Extracted from Weiner, Joann M., "OECD Forum on Harmful Tax Practices Marks Fifth Year", Tax Notes International, Vol 31, Issue 3, 21 July 2003

		Issues Raised			
Tax Haven	Date of Letter	Level Playing Field	Obtain Equivalent Commitment	Receive Technical Assistance	Maintain Fiscal Autonomy
Advance Commitments					
Bermuda	15 May 2000	—	—	—	—
Cayman Islands	18 May 2000	—	—	—	—
Cyprus	24 May 2000	—	—	—	—
Malta	19 May 2000	—	—	—	—
Mauritius	24 May 2000	—	—	—	—
San Marino	4 Apr 2000	—	—	—	—
Scheduled Commitments					
Anguilla	5 May 2002	Yes	Yes	Yes	Yes
Antigua and Barbuda	20 Feb 2002	Yes	Yes	No	Yes
Aruba	31 May 2001	No	No	No	No
Bahamas	15 Mar 2002	Yes	Yes	No	Yes
Bahrain	11 Sep 2001	No	No	No	No
Belize	8 Mar 2002	Yes	Yes	No	No
British Virgin Islands	2 Apr 2002	Yes	No	No	Yes
Cook Islands	22 Mar 2002	Yes	Yes	Yes	Yes
Dominica	5 Mar 2002	Yes	No	No	Yes
Gibraltar	27 Feb 2002	Yes	Yes	No	Yes
Grenada	27 Feb 2002	Yes	Yes	Yes	Yes
Guernsey	22 Feb 2002	Yes	Yes	No	Yes
Isle of Man	13 Dec 2000	No	Yes	No	Yes
Jersey	22 Feb 2002	Yes	Yes	No	Yes
Montserrat	27 Feb 2002	Yes	Yes	Yes	Yes
Netherlands Antilles	11 Nov 2000	No	No	Yes	No
Niue	11 Apr 2002	Yes	Yes	Yes	Yes
Panama	15 Apr 2002	Yes	Yes	No	Yes
Samoa	19 Apr 2002	Yes	Yes	Yes	Yes
St. Kitts and Nevis	5 Mar 2002	Yes	No	No	Yes
St. Lucia	28 Feb 2002	No	No	No	No

Seychelles	13 Feb 2001	No	No	No	No
St. Vincent	2 Feb 2002	Yes	Yes	No	Yes
Turks & Caicos	8 Mar 2002	Yes	Yes	Yes	Yes
U.S. Virgin Islands	4 Mar 2002	No	No	No	No
Vanuatu	15 May 2003	Yes	Yes	Yes	Yes

Note: This information is obtained from the letters sent to the OECD from the jurisdictions and is available on the OECD Web site. Key dates in this process are the release of the progress report in June 2000, the progress report in November 2001 (which extended the deadline for making a commitment to February 2002), and the release of the list of uncooperative tax havens on 18 April 2002.

APPENDIX P

MAURITIUS' LIST OF DOUBLE TAXATION AVOIDANCE TREATIES

As of 11 February 2004, Mauritius has ratified 32 treaties and is negotiating others. The treaties currently in force are:

Belgium
Botswana
Croatia
Cyprus
France
Germany
India
Indonesia
Italy
Kuwait
Lesotho
Luxembourg
Madagascar
Malaysia
Mozambique
Namibia
Nepal
Oman
Pakistan
People's Republic of China
Russian Federation
Rwanda
Senegal
Singapore
South Africa
Sri Lanka
Swaziland
Sweden
Thailand
Uganda
United Kingdom
Zimbabwe

APPENDIX Q

IMF KEY POLICY RECOMMENDATIONS TO SINGAPORE

These recommendations were listed in the IMF's report, "Singapore: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, Payment and Settlement Systems, Monetary and Financial Policy Transparency, and Anti-Money Laundering". It is based on the information available at the time it was completed on 25 February 2004.

- Macro-prudential monitoring: Further strengthen the MAS' monitoring of (i) the risks arising from new financial products; (ii) cross-border financial flows (including flows in the Asian Dollar Market (ASD) and particularly transactions between branches and head offices) to detect potential strains in the offshore banking market; (iii) household and corporate sector balance sheets to assess the resilience of the private sector; and (iv) market and counter-party risks of derivatives activities by financial institutions.

- Regulatory systems and supervisory practices: Further enhance the MAS' legal and regulatory framework through the completion of the review of the regulatory minimum capital requirements for local banks and the implementation of its new risk-based capital framework for the insurance industry, planned for introduction in late 2004; and complete the ongoing review of the MAS Act.

- The MAS' accountability, independence, and oversight capabilities: Reduce the potential for conflicts of interest arising from the multiple official responsibilities of the Chairman of the MAS.

- Monetary and financial policy transparency: Provide more information on how supervisory actions are taken in line with the risk-based supervisory framework and disclose more information to improve the public's ability to assess supervisory performance.

- Anti-money laundering and combating the financing of terrorism: Improve the effectiveness of cross-border mutual legal assistance.

- Capital market development: Review and address factors that may constrain the further development of the corporate bond market, including the limited use of credit ratings, guaranteed interest rates of the Central Provident Fund (CPF), and the CPF investment policy.

APPENDIX R

SINGAPORE: KEY FINANCIAL SECTOR REFORM MEASURES, 1999 - 2003

These reform measures were listed in the IMF's report, "Singapore: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, Payment and Settlement Systems, Monetary and Financial Policy Transparency, and Anti-Money Laundering". It is based on the information available at the time it was completed on 25 February 2004.

Liberalisation measures

The MAS announced in 1999 a five-year program to liberalise the domestic banking sector in order to strengthen Singapore's banking system and the local banks. The program included an expansion of banking privileges and a broadening of the range of activities for foreign banks. The consolidation of local banks was also encouraged.

In 2002, all restrictions on the use of the Singapore dollar in international transactions were removed except for the following:

- Non-resident financial entities must swap Singapore dollar proceeds from Singapore dollar loans, equity, and bond issues into foreign currency to finance activities abroad.
- Financial institutions may not extend credit facilities larger than S$5 million if there is reason to believe that the funds may be used for Singapore dollar currency speculation.

Legislative and regulatory reforms

2001

- The Companies Act was amended to enhance prospectus disclosure requirements.
- An amendment to the Banking Act brought into force new policy measures, including the separation of financial and non-financial businesses of local banks, and the revision of the rules on property-related loans to more effectively monitor banks' exposure to the property sector.
- The new Liquidity Supervision Framework was passed to tie liquid asset requirements to a bank's liquidity profile and risk management capabilities.

2002

- The Financial Advisors Act (FAA) was enacted to integrate the different acts governing financial advisory services and to streamline licensing requirements, and the Securities and Futures Act (SFA) to consolidate legislation of capital market activities and introduced disclosure-based market supervision.
- A risk-based capital framework for securities for capital markets services license holders came into force.
- The Payment and Settlement Systems (Finality and Netting) Act was enacted to provide for protection of the payment and settlement systems from disruptions.
- The Consumer Credit Bureau was established.

2003

- The Code of Corporate Governance too effect. Although the Code is not mandatory, all listed companies are required to disclose their governance practices and any deviations from the Code in their annual reports.
- Listed companies with market capitalisation of S$75 million or more were required to make quarterly reports.

Measures to develop capital markets

1999

- The Singapore Exchange (SGX) was formed following the demutualization and merger of the Stock Exchange of Singapore and Singapore International Monetary Exchange.

2000

- Repo-related Singapore government securities (SGS) holdings were allowed to count toward the liquid asset requirement to boost the repo market.
- A securities lending facility for primary dealers of SGS securities was introduced.
- The SGX was listed on the SGX Main Board.

2001

- Investment restrictions on CPF Special Accounts were liberalised.
- The five-year SGS bond futures contract was launched by the SGX.
- Fifteen-year SGS bonds were issues to extend the benchmark yield curve.

2002

- A new SGX listing manual came into effect. The changes include revised distribution guidelines for initial public offerings.
- The borrowing period for the securities lending facility was extended, and full order book information on the SGX securities market was made available to investors on a subscription basis.

APPENDIX S

SINGAPORE: MAIN FINDINGS OF THE ASSESSMENTS OF OBSERVANCE OF KEY INTERNATIONAL STANDARDS AND CODES

These findings were listed in the IMF's report, "Singapore: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insuranee Regulation, Seeurities Regulation, Payment and Settlement Systems, Monetary and Financial Poliey Transpareney, and Anti-Money Laundering". It is based on the information available at the time it was completed on 25 February 2004.

- Basel Core Principles (BCP) for Effective Banking Supervision: Overall, the MAS has established a sound prudential and regulatory framework for effective supervision of its commercial banking sector and has achieved a high level of observance of the BCP. There are no weaknesses that raise financial stability concern.

- International Association of Insurance Supervisors (IAIS) Insurance Core Principles: Singapore has a high level of observance of the IAIS principles. Significant initiatives are currently being developed in consultation with the industry – particularly the overhaul of the capital standards to a more comprehensive and risk-based approach with new rules giving specific attention to corporate governance and internal controls. The implementation and enforcement of these initiatives, which are well advanced, will further improve observance.

- International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation: Singapore has achieved a high degree of compliance with the IOSCO principles. The framework for the oversight and regulation of securities markets, intermediaries, issuers, and collective investment schemes is well developed, sophisticated, and meets international standards. The MAS should require periodic reporting of net asset values and ensure that a Collective Investment Scheme (CIS) operator has systems in place to calculate net asset values correctly.

- Committee on Payment and Settlement System (CPSS) Core Principles for Systemically Important Payment Systems (CPSIPS): Singapore has a highly developed payment system. The MEPS – a systemically important payment system – is a reliable and robust real-time gross settlement system and exhibits significant observance of CPSIPS principles. The settlement risk of foreign exchange transactions in Singapore dollars has been further reduced by the inclusion of the Singapore dollar in the CLS in September 2003.

- CPSS-IOSCO Recommendations for Securities Settlement Systems: Neither the MAS Electronic Payment System-Singapore Government Securities (MEPS-SGS) – which clears and settles SGS on an real-time gross settlement basis—nor the

Central Depository Private Limited (CDP) – which clears and settles equities and private debt securities – is subject to major vulnerabilities. While the MAS oversight objectives with respect to securities settlement systems are set out in various documents, it is recommended that the MAS publish a document on the oversight framework for securities settlement systems and its approach to its administration.

- Transparency in Monetary and Financial Policies: The transparency of monetary policy framework has improved substantially in recent years. Given the exchange rate regime-based monetary policy, however, the authorities remain cautious about publishing certain information on the monetary policy framework and monetary operations. For example, neither the weights used in the trade-weighted exchange rate index nor the precise limits of the band are disclosed. Similarly, the extent of MAS interventions in the foreign exchange market is not disclosed on a predetermined or timely schedule. Greater disclosure in these areas could be considered to the extent it does not compromise the monetary policy regime. The MAS has made steady progress toward improving transparency in financial policies in recent years and now meets many of the elements of the Transparency Code. The MAS could further improve transparency through providing more detailed information on recent developments in the financial sector and its supervisory activities in its regular publications, including regarding local financial institutions' overseas operations.

- Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT): Singapore now has in place a sound and comprehensive legal, institutional, and policy and supervisory framework for AML/CFT and the authorities have demonstrated a strong commitment to its effective implementation. Though some steps have been taken with the enactment of a domestic mutual legal assistance law and ongoing negotiations for several bilateral treaties, the effectiveness of cross-border mutual legal assistance needs to be improved as it relates to compulsory assistance at international request, including the provision of bank records. The Palermo Convention is signed but yet to be ratified. Some aspects of best practice for customer due diligence need to be specified more clearly and in greater detail, though implementation was observed in individual institutions.

APPENDIX T

INTERNATIONAL TAX AND INVESTMENT ORGANISATION (ITIO) MEMBERS

Isle of Man
Anguilla
Antigua & Barbuda
Bahamas
Barbados
Belize
British Virgin Islands
Cayman Islands
St Kitts & Nevis
St Lucia
St Vincent & the Grenadines
Turks & Caicos
Panama
Pacific Cook Islands
Samoa
Vanuatu
Labuan – Malaysia

APPENDIX U

STATUS OF COUNTRIES AND TERRITORIES IN SUPRANATIONAL ORGANISATIONS' INITIATIVES

First Report / List issued by OECD, FATF, FSF and IMF regarding tax havens and their anti-money laundering policy

Countries	OECD[849]	FATF[850]	FSF[851]	IMF[852]
Andorra	•		2	■
Anguilla	•		3	■
Antigua and Barbuda	•	√	3	■
Aruba	•		3	■
Bahamas	•	×	3	■
Bahrain	•		2	■
Barbados	•		2	■
Belize	•	√	3	■
Bermuda		√	2	■
British Virgin Islands	•	√	3	■
Campione				■
Cayman Islands		×	3	■
Cook Islands	•	×	3	■
Costa Rica			3	■
Cyprus		√	3	■
Djibouti				■
Dominica	•	×		■
Dublin			1	■
Gibraltar	•	√	2	■
Grenada	•			■

849 Organisation for Economic Co-operation and Development, *Towards Global Tax Co-operation - Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs - Progress in Identifying and Eliminating Harmful Tax Practices* (2000, OECD). • represents countries or territories listed as tax havens in the report.

850 Financial Action Task Force, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2000, FATF). √ represents countries or territories which co-operated in the fight against money laundering; × represents non-cooperative.

851 Financial Stability Forum, 'Financial Stability Forum Releases Grouping of Offshore Financial Centres (OFCs) to Assist in Setting Priorities for Assessment' (Press Release, 26 May 2000) 2. 1 represents countries or territories which are generally perceived as having legal infrastructures and supervisory practices, and/or a level of resources devoted to supervision and co-operation relative to the size of their financial activities, and/or a level of co-operation that are largely of a good quality and better than in other OFCs. 2 represents countries or territories which are generally perceived as having legal infrastructures and supervisory practices, and/or a level of resources devoted to supervision and co-operation relative to the size of their financial activities, and/or a level of co-operation that are largely of a higher quality than group 3, but lower than group 1. 3 represents countries or territories which are generally perceived as having legal infrastructures and supervisory practices, and/or a level of resources devoted to supervision and co-operation relative to the size of their financial activities, and/or a level of co-operation that are largely of a lower quality than in group 2.

852 International Monetary Fund, *Offshore Financial Centres – IMF Background Paper* (2000, IMF). ■ represents countries, territories or jurisdictions with OFCs.

Guam				■
Guernsey	●	√	1	■
Hong Kong SAR			1	■
Isle of Man	●	√	1	■
Israel		×		■
Japan				■
Jersey	●	√	1	
Labuan			2	■
Lebanon		×	3	■
Liberia	●			■
Liechtenstein	●	×	3	■
London				■
Luxembourg			1	■
Macau SAR			2	■
Madeira				■
Maldives	●			
Malta		√	2	■
Marianas				■
Marshall Islands	●	×	3	
Mauritius		√	3	■
Micronesia				■
Monaco	●	√	2	■
Montserrat	●			■
Nauru	●	×	3	■
Netherlands				■
Netherlands Antilles	●		3	■
Niue	●	×	3	■
Panama	●	×	3	■
Philippines		×		■
Puerto Rico				■
Russia		×		
Samoa	●	√	3	■
Seychelles	●		3	■
Singapore			1	■
St Lucia	●	√	3	■
St Christopher & Nevis	●	×	3	■
St Vincent and the Grenadines	●	×	3	■
Switzerland			1	■
Tahiti				■
Tangier				■
Thailand				■
Tonga	●			
Turks & Caicos	●		3	■
United States				■
Uruguay				■
US Virgin Islands	●			
Vanuatu	●		3	■
West Indies				■

Latest Report / List issued by OECD and FATF

Countries	OECD[853]	FATF[854]
Andorra	●	
Anguilla	○	
Antigua and Barbuda	○	√
Aruba	○	
Bahamas	○	√
Bahrain	○	
Barbados	○	
Belize	○	√
Bermuda		√
British Virgin Islands	○	√
Cayman Islands		√
Cook Islands	○	×
Cyprus		√
Dominica	○	√
Gibraltar	○	√
Grenada	○	
Guernsey	○	√
Indonesia		×
Isle of Man	○	√
Israel		√
Jersey	○	√
Lebanon		√
Liberia	●	
Liechtenstein	●	√
Maldives	○	
Malta		√
Marshall Islands	●	×
Mauritius		√
Monaco	●	√
Montserrat	○	
Myanmar		×
Nauru	○	×
Netherlands Antilles	○	
Nigeria		×
Niue	○	√
Panama	○	√
Philippines		×
Russia		√
Samoa	○	√

853 Organisation for Economic Co-operation and Development, *The OECS's Project on Harmful Tax Practices: The 2004 Progress Report* (2004, OECD). ○ represents co-operative tax havens. ● represents un-cooperating tax havens.

854 Financial Action Task Force, *Annual Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2004). √ represents countries or territories which co-operated in the fight against money laundering; × represents non-cooperative.

Seychelles	o	
St Lucia	o	√
St Christopher & Nevis	o	√
St Vincent and the Grenadines	o	√
Tonga	o	
Turks & Caicos	o	
US Virgin Islands	o	
Vanuatu	o	

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